(1)

Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

GABE KAIMOWITZ,

Petitioner,

v.

ORLANDO, FL; RICK BERNHARDT, and ORLANDO NEIGHBORHOOD IMPROVEMENT CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

H. Gabriel Kaimowitz
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QUESTIONS PRESENTED

1. Is Petitioner entitled to relief from final orders and judgments in favor of Orlando, Florida, and Rick Bernhardt, pursuant to Rule 60(b)(6), Federal Rules of Civil Procedure, in light of extraordinary circumstances? They include:

• a systematic derogation of due process of law by a cover up of *ex parte* communications without notice to him,

• between and among trial and appellate judges, court personnel and defendant Orlando agents including Bernhardt, (at) private meetings held for several years which had been arranged by the federal General Services Administration ("GSA"),

• about a new federal courthouse discussed in the context of municipal planning goals for the surrounding historically black Southwest Quarter of the city.

2. Is Petitioner separately entitled to relief in light of his timely pursuit pursuant to Rules 11(c) and 60(b)(3), Federal Rules, from the misrepresentation and fraud by the Orlando Neighborhood Improvement Corporation ("ONIC"), which were exposed during in its *judicially bifurcated* pursuit of attorney fees

PARTIES

All parties in this matter are set forth in the caption. However, starting in 2001, during a post-judgment controversy about attorney fees, first the trial court and then the appeals court bifurcated the demands of Orlando and Rick Bernhardt from those of the Orlando Neighborhood Improvement Corporation ("ONIC"). Attempts to consolidate were denied thereafter. However, all proceedings stem from a single action arising under the False Clams Act initiated by the Petitioner for the United States against these Respondents.

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No. 03-

IN THE

SUPREME COURT OF THE UNITED STATES

GABE KAIMOWITZ

Petitioner,

vs.

ORLANDO, FL; RICK BERNHARDT, and ORLANDO NEIGHBORHOOD IMPROVEMENT CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CITATIONS BELOW

The relevant rulings below are unreported. The United States Court of Appeals on Nov. 6, 2003, dismissed the most recent appeal, mooted all motions including a suggestion for hearing *en banc*, and limited further submission to a petition for rehearing. (See Appendix, p. 1-a, hereafter by page number only). On Dec. 5, 2003, citing that decision, the Court's Clerk returned all copies of a petition for *en banc* rehearing (p. 2-a). The appeal was timely, from an Order of July 23, 2003.

That Order denied relief sought pursuant to Rule 60(b), Federal Rules of Civil Procedure, from all previous final orders and judgments (p. 3-a). The dismissed appeal had been timely amended, after the trial court entered an Order of Sept. 17, 2003, to deny reconsideration of the aforementioned July 23 Order (p. 5-a).

JURISDICTION

On Jan. 23, 2004, Justice Kennedy entered an order extending the time for filing a petition for a writ of certiorari to and including March 4, 2004 (p. 115-a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

RELATED PROCEEDINGS

A petition to this Court for an extraordinary writ of mandamus, *In re H. Gabriel Kaimowitz*, #03-1021, (S.Ct. Jan. 16, 2004) was filed for judicial reassignment of a judge in another False Claims Act civil action, because of her involvement in the aforementioned *ex parte* communications concerning the new U.S. Courthouse. On Sept. 17, 2003, the Eleventh Circuit denied *en banc* consideration of a petition filed there for the same purpose. Judges Joel Dubina and Lanier Anderson III did not participate in the *en banc* consideration after they were identified as participants in the *ex parte* communications (p. 6-a). Since the filing of the petition, the complaint has been answered for Orlando, ONIC and its director, *in U.S. ex rel Gabe Kaimowitz, qui tam, v. Ansley, et al.*, #6:02-1509-cv-Orl (M.D. Fl. 2002).

Appellate briefing has been completed on the merits of an appeal by Kaimowitz as counsel in *United States ex rel Attorneys Against American Apartheid, qui tam, v. Orlando*, #03-15344-FF (11th Cir. 2003). On Feb. 19, 2004, Judge Dubina granted a motion for his recusal from that appeal (p. 6-a). Judge Anderson also will not participate (p. 7-a).

STATUTES, RULES AND CANONS INVOLVED

28 U.S.C. §1254(1) states in pertinent part: "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (2) By writ of certiorari granted upon the petition of any party to any civil...case, before or after rendition of judgment or decree."

28 U.S.C. §455(a) provides: "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

28 U.S.C. §455(b) includes: "He shall also disqualify himself in the following circumstances:.... (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding...."

28 U.S.C. §455(d) provides: "For the purposes of this section the following words or phrases shall have the meaning indicated: (1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation....(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party...."

28 U.S.C. §455(f) states: "Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome),"

"disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification."

31 U.S.C. §3730(b) includes: "(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting. (2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure....(4)...the Government shall–(A) proceed with the action...or (B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action."

31 U.S.C. §3730(d)(4) states: "If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment."

Rule 3(c) of the Federal Rules of Appellate Procedure states: "(1) The notice of appeal must: (A) specify the party...taking the appeal by naming each....(B) designate the judgment, order, or part thereof being appealed; and (C) name the court to which the appeal is taken."

Rule 4(a)(4) of the Federal Rules of Appellate Procedure includes: "(A) If a party timely files in the district court any of the following motions under the Federal Rules"

"of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:...(iv.) to alter or amend the judgment under Rule 59...(vi). for relief under Rule 60 if the motion is filed no later than 10 days after the judgment is entered. (B)(i) If a party files a notice of appeal after the court announces or enters a judgment–but before it disposes of any motion listed in Rule 4(a)(4)(A)–the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered. (ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal–in compliance with Rule 3(c)–within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion. (iii) No additional fee is required to file an amended notice."

Rule 35(b) of the Federal Rules of Appellate Procedure includes: "Petition for Hearing or Rehearing En Banc. A party may petition for hearing or rehearing en banc....(c) Time for Petition for Hearing or Rehearing En Banc. A petition that an appeal be heard initially en banc must be filed by the date when the appellee's brief is due. A petition for a rehearing en banc must be filed within the time prescribed by Rule 40 for filing a petition for rehearing."

Rule 11(c) of the Federal Rules of Civil Procedure provides: "Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation. (1) How Initiated. (A) By Motion. A motion for sanctions under"

"this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion.... (B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto. (2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a non-monetary nature, an order to pay a penalty into court....

Rule 60, Federal Rules of Civil Procedure, includes: "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party...or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reason...(3) not more than one year after the judgment, order or proceeding was entered or taken....Ths rule does not limit the power of a court to...set aside a judgment for fraud upon the court...."

Canon 2A, Code of Conduct for United States Judges, 175 F.R.D. 363, 365, states: "A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

Canon 3A(4), Code of Conduct for United States Judges, 175 F.R.D., at 367 provides: "A judge should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law, and except as authorized by law, neither initiate nor consider *ex parte* communications on the merits, or procedures affecting the merits, of a pending or impending proceeding. A judge may, however, obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond...."

Canon 3(C), Code of Conduct for United States Judges, 175 F.R.D. at 368, includes: "(1) A judge shall disqualify himself or herself in a proceeding in which the judgment's impartiality might reasonably be questioned, including but not limited to instances, in which: (a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of evidentiary facts concerning the proceeding...."

Canon 4, Code of Conduct for United States Judges, 175 F.R.D. at 372, notes: "A judge, subject to the proper performance of judicial duties, may engage in the following law-related activities, if in doing so, the judge does not cast reasonable doubt on the capacity to decide impartially any issue that may come before the judge....A judge may ...participate in other activities concerning the law, the legal system, and the administration of justice....(and) serve as a member...of an organization concerning (those activities.)"

STATEMENT OF THE CASE

On Mar. 25, 1994, Petitioner, an experienced civil rights attorney, filed an action against Respondents pursuant to the procedures provided in the False Claims Act, as amended, 31 U.S.C. §3729, *et seq.* ("FCA#1"). For months in 1993-94, on behalf of several plaintiffs he represented in *COG, Greater Washington Shores Homeowners Association v. Orlando and its Mayor*, #88-962-Civ-Orl (M.D. Fla. 1988),[1] Petitioner pursued their allegations of violations by Respondents with the Jacksonville, Florida, Regional Office of the U.S. Department of Housing and Urban Development ("HUD"). HUD was unable or unwilling to provide relief.

Before ordering transfer of FCA#1, from Jacksonville to the Orlando Division, Judge W. T. Hodges, on Feb. 15, 1995, (pp. 8-a), and again on Feb. 27, 1995 (pp 10-a, 11-a), described the nature of the specific allegations made in the pleading for the only times to date; in any court order, opinion or judgment in this litigation:

> The complaint alleges that the Defendants "have made claims violative of federal law to induce Community Bloc Grant Development (sic)("CDBG") funds and other grants and loans from ...(HUD), and the complaint also seeks "injunctive relief to bar use of such funds for maintenance and expansion of a commercial district, low-income public housing, and alleged rehabilitation of multi-family low-income rental units in virtually all black neighborhoods of Orlando."

Id., (Orders of Feb. 15, and Feb. 27, 1995).

1–The five-year-old civil action was settled in November 1993, after all three Orlando Division Article III judges disqualified themselves, the last in September 1993. Judge Fawsett had disqualified herself for the third time, on motion of Petitioner here, in that action.

On Feb. 15, 1995, Judge Hodges also noted:

> The United States has filed a notice of election to decline intervention....The notice also requests, under 31 U.S.C. § 3730, that the Court not dismiss this action without the consent of the United States and that the parties be required to serve all pleadings on the United States. Upon due consideration, these requests are GRANTED and the Plaintiff and Defendants are directed to serve all future pleadings on the United States, and are directed to file in conjunction with any motion seeking the dismissal of this action, a motion for approval by the United States of the proposed dismissal.

Id.

On Feb. 27, 1995, Judge Hodges stated without comment that the nominal plaintiff contended in objections to change of venue that judicial bias might be a factor if transfer were effected. The jurist acknowledged that venue was proper in Jacksonville and usually the plaintiff's choice of forum was entitled to considerable weight. But he granted the transfer: "(I)n a false claims act case, a qui tam plaintiff's choice is entitled to relatively little weight because plaintiff is asserting the rights of the real party in interest, the United States (citation omitted)" *Id.* (p. 11-a).

Like all subsequent orders, judgments and affirmances in FCA #1, in the district and appeals courts, the February 1995 decisions were entered without evidentiary hearing, oral argument, or any other opportunity to appear before an Article III judge, since Mar. 25, 1994, to date.

In Orlando, all pre-trial proceedings appeared to be completed before a jury trial scheduled for July 1996, But Judge Patricia C. Fawsett on Aug. 23, *sua sponte* again denied recusal, reopened discovery, and opportunity for filing dispositive motions. No one had asked for that relief.

A jury trial was rescheduled for December 1996. On Nov. 12, 1996, a magistrate judge in person did conduct a pre-trial conference and granted from the bench Plaintiffs' unopposed motion for court-mandated mediation (pp. 13-a/14-a). But on Nov. 14, the magistrate *sua sponte* in a written order (p. 15-a) converted mediation into a settlement conference to be conducted by a fellow magistrate (p. 16-a)..

On Nov. 21, Stephen Gripkey, esq., appeared for the United States by phone at the conference. He was an attorney with the U.S. Justice Department ("Department") who had participated actively before and after its election not to intervene. Gripkey made clear he believed that the United States continued to have an interest in the claims, even if the parties were able to settle them, (p. 17-a).

Then Gripkey wrote to an attorney with another federal agency about a possible new issue which might be raised in addition to the six specific claims he enumerated (pp.18-a/19-a). "Trial is currently set for December 2, 1996, although relator's schedule makes it likely that trial will not start until December 3, 1996 (p. 18-a)."

On Nov. 25, 1996, Judge Fawsett granted summary judgment to all Defendants on all claims without specifying any of the counts (pp. 20-a/25-a). No mention was made of the Department. Judgment was granted to Defendants along with costs of their action (p. 25-a).

On Feb. 17, 1997, Fawsett declined to reconsider her judgment (pp. 26-a/28-a). Judge Fawsett quoted Judge Hodges' order requiring Department approval before dismissal, (p. 27-a), but stated that Minotti v. Lensink, 895 F.2d 100, 103 (2d Cir. 1990), found the law did not require either her or Defendants to seek consent in advance of judgment, since the Department did not intervene. Judge Fawsett also asked the magistrate to make "a determination of whether attorney's fees should be granted" (p. 28-a).

On Mar. 26, 1997, the magistrate decided that since an appeal had been filed from a judgment on the merits, "it is possible that no fee award would be appropriate under any theory.... If the judgment is affirmed by reasoning of the court of appeals, (it) will be instructive in deciding the motions. It does not appear that consideration of the appeal itself would be better served if accompanied by a decision on the fees" (p. 29-a).

An earlier appeal by Petitioner here on an issue unrelated to the merits of FCA #1 delayed consideration of the summary judgment appeal. See *Kaimowitz v. Orlando,* 122 F.3d 41, mod. 131 F.3d 950 (11th Cir. 1997). On May 8, 1998, on the judgment appeal, the Eleventh Circuit's first Order before its affirmance favored Petitioner. Motions to dismiss the appeal or strike the Petitioner's brief were denied (p. 31-a). Petitioner observed that in the Order, the Eleventh Circuit did not acknowledge the United States as a party. Petitioner's timely motion to have the United States declared the real party in interest was unopposed.

On Oct. 5, 1998, an Eleventh Circuit panel affirmed the judgment below in a one-page unpublished opinion without citation except to 31 U.S.C. §§3729-33 (p. 32-a). The panel included former Chief Judge G. B. Tjoflat. Judge Tjoflat also separately signed a decision on the issue of the United States as the real party in interest, and added a "denial" of that motion when Petitioner noted the omission in a phone call to the clerk (p. 33-a). He became ubiquitous throughout the appeals during the next five years.

On Feb. 16, 1999, the affirmance was entered as a mandate. In a separate Order on various motions, the Tjoflat panel without citation granted as to entitlement the two for attorney's fees filed by Appellees, and denied a motion to strike the fees application by counsel for Orlando and Bernhardt. Fees were sought after a rule deadline (p. 35-a).

On directed remand to determine the amount owed for the appeal, the magistrate on May 14, 1999, found "Defendants were entitled to their attorney's fees under Title 31 U.S.C. §3730(d)(4)," though authority for the award had not been cited above (p. 36-a):

> The Eleventh Circuit has already found the case to be clearly frivolous and vexations (sic), for purposes of awarding appellate fees. Based upon a review of the record, Defendants are also entitled to attorney's fees incurred in this Court. Despite the constant barrage of allegations and invective that have characterized Plaintiff's filings, the claim itself was wholly without merit (p. 37-a).
>
> To the extent Plaintiff requests a hearing as to issues pertaining to Defendants' entitlement to attorney's fees, the request is DENIED (p. 38-a).

Magistrate's Order, Report and Recommendation.

On July 9, 1999, Judge Fawsett summarized pending papers, and ruled *en toto* (p. 39-a):

> Upon *de novo* review of the above-noted pleadings, the Court ADOPTS, AFFIRMS, AND APPROVES the Report and Recommendation of the United States Magistrate Judge....The Clerk is directed to grant and deny the motions as set forth in the Report and Recommendation.

Id.

The magistrate held more than 10 hours of hearings on the amount of fees owed to Orlando and Bernhardt on Sept. 1 and Oct. 27, 2000. ONIC's counsel submitted his fee application before the first hearing and attended both, but the Magistrate stated ONIC's demand would be considered later. For the others, he found $100,000 plus for time spent on six appeals including *Kaimowitz v. Orlando*, 122 F.3d 41, *supra,* and at trial by 10 different attorneys to be justified.

But the magistrate recommended $20,000 be paid to Orlando and Bernhardt. On Jan. 23, 2001, Judge Fawsett approved that amount, (pp. 40-a/46-a) after she denied Petitioner's latest attempt to preserve his documented assertions that she appeared either to be biased against him and/or for Orlando and/or ONIC's counsel (p. 41-a, *et seq.*)

Petitioner's latest motion for recusal was based on revelations in the Orlando billing statements that in May/June 1996 there had been at least five *ex parte* contacts between the law firm representing Orlando and the chambers of Judge Fawsett and the magistrate. The billing was for more than an hour of time, on two occasions for at least 20 minutes each. Petitioner had noted without contradiction during fee amount hearings that those *ex parte* chats occurred at a time when defendants' attorneys appeared to have let the clock run out on dispositive motions, so that a July 1996 trial would be inevitable if the scheduling order were followed.

Without noting that Petitioner was never told about those *ex parte* communications, before or after they were made, until he was asked to pay for the time, Judge Fawsett stated that the evidence "indicates only that Defendants' counsel had someone contact the Undersigned's judicial assistant regarding purely ministerial matters (p. 42-a)." No mention was made in her Order of ONIC's demand. Judgment was entered on Jan. 25, 2001, for Orlando and Bernhardt and against Petitioner for $20,000 (p. 46-a).

Bifurcation of Fees' Consideration at the Trial Level

On Feb. 7, 2001, Judge Fawsett ordered the magistrate to make a recommendation on ONIC's Motion for Entry of Final Judgment and Fees, filed Aug. 30, 2000 (p. 47-a). On Feb. 15, the Magistrate did so (p. 48-a):

> In addition to being untimely the motion is prejudicial to Plaintiff, co-defendants, and the Court. It was in the best interests of all concerned that all

> claims be heard in one proceeding, especially considering that the award in the end was limited by Plaintiff's financial inability to pay (p. 50-a).

Magistrate's Report and Recommendation, *supra*.

Magistrate recommended that ONIC receive nothing. ONIC did not object. Aside from its singular Aug. 30, 2000, request for judgment, ONIC in fact has offered nothing to support its fee demand since October 1998, despite its claim to have spent more than $150,000 in defense at the trial and appeals levels. On Feb. 27, 2001, Petitioner offered a safe harbor to ONIC's counsel if he would withdraw the Aug. 30, 2000, motion before Judge Fawsett ruled on the aforementioned Report and Recommendation.

Petitioner by then had reason to believe ONIC had abandoned its effort to get a fee award, because its counsel would have to substantiate its time claims. Orlando billing statements also had revealed correspondence about a "courtesy defense" for ONIC by the City. That was fleshed out in response to a Florida Public Records Act request.

In 1995, Orlando had recommended a "courtesy defense" for ONIC, but changed its position in part, because:

> (T)he general theme of the lawsuit is that ONIC is not really a free standing enterprise but rather a shell set-up by the City of Orlando for the purpose of obtaining federal funds and I believe that if we provide a courtesy defense to ONIC it would only serve to lend some credence to the Plaintiff's allegation (p. 51-a).

Internal Memo, Orlando Risk Management, Feb. 7, 1995.

At the expiration of the "safe harbor" period, Petitioner moved for sanctions against ONIC's counsel. He also had filed a timely appear from the $20,000 judgment.

On April 9, 2001, Judge Fawsett denied sanctions as untimely (p. 52-a), and by separate Order summarily adopted

the Magistrate's recommendation that ONIC get nothing (p. 53-a). ONIC had not challenged denial of fees. Petitioner amended his appeal notice to include the denial of sanctions.

Petitioner also moved for reconsideration of the denial of sanctions. He submitted more documents to flesh out the collusion of counsel for Orlando and for ONIC since 1995, to cover up the latter's role in the litigation. Judge Fawsett denied that motion on June 8, (pp: 54-a/-55-a).

In June 2001, the Orlando Division received another False Claims Act suit filed by Petitioner, as counsel for Attorneys Against American Apartheid, as relator, for the United States, against Orlando and its former mayor Glenda Hood. Petitioner had filed the action ("FCA #2") initially on Aug. 5, 1999, in the U.S. District Court for the District of Columbia. For FCA #2, claimants got *amicus* brief support from the Department, and a court denial of the defendants' motion to dismiss before the venue change.

FCA #2 was transferred to Judge John Antoon II. after Orlando Division Judge Gregory Presnell disqualified himself "in the interests of justice," Petitioner moved for Judge Antoon's recusal, based in part on public reports about a controversy concerning a new federal courthouse. Nothing would be known for another 15 months about the *ex parte* communications involving judges and jurists.

> (T)he court finds that recusal is warranted based on Plaintiff's allegation that Defendant, Glenda Hood, has publicly supported the judges of the Orlando Division in their views pertaining to the construction of a new federal courthouse. A reasonable person might infer from such allegations that this court has a relationship with Orlando or Mayor Hood which would compromise the court's objectivity and fairness.

Order of Judge Antoon II, Dec. 26, 2001 (pp. 56-a/57-a).

Bifurcation of Fees' Consideration at the Appeals Level

In July 2001, the Eleventh Circuit Court Clerk announced that separate appeals numbers had been given to the appeal notices filed as amendments. Instead of one appeal, three separate appeals had been defined--the $20,000 Jan. 23-25, fee judgment to Orlando Defendants (#01-11514); denial of sanctions against ONIC counsel on Apr. 9, 2001 (#01-13857), and refusal to reconsider that denial, on June 8 (#01-13858). The Court demanded fees for the last two appeals, dismissed them when Petitioner initially refused, and restored them to the docket upon payment.

Petitioner moved for their consolidation. On Feb. 13, 2002, Judge Tjoflat consolidated the last two but denied consolidation with the $20,000 judgment (p. 58-a). The next day, a Judge Tjoflat panel affirmed that ruling (p. 59-a).

> (Petitioner) also argues that he was prejudiced by the district court judge's *ex parte* communications with counsel for Bernhardt and Orlando, thus the district court erred in denying his motion to recuse the district court judge. The district court thoroughly addressed these issues in its order of January 23, 2001, the order now appealed. We find no fault in the district court's analysis of the issues or in its application of the law to the factual scenario before it. AFFIRMED.

Id.

By then FCA #2 had been assigned to Judge Fawsett. Judge Fawsett resisted recusal, especially Judge Antoon's basis for it. Judge Fawsett asked then District Chief Judge Elizabeth Kovachevich to appoint a judge to resolve the issue. Judge Kovachevich agreed, then vacated her order, and returned FCA#2 to Judge Fawsett (pp. 60-a/61-a).

On Apr. 11, 2002, the Judge Tjoflat panel denied rehearing for the FCA #1 $20,000 appeal (pp. 62-a/63-a).

On Apr. 25, 2002, in FCA #2, Judge Fawsett denied the motion for her recusal. She rejected all the issues raised by Petitioner, including allegations based on newspaper reports about the public support shown by Glenda Hood to the judges during the controversy about the new federal courthouse (p. 65). She admitted to discussions about the "design and construction" of the proposed federal court house with municipal officials, including Mayor Glenda Hood (p. 66-a). She claimed all discussions regarded "an issue other than matters pending before the Court in court proceedings (*id*)." Less than five months later, on Sept. 17, 2002, Judge Fawsett recused herself from FCA #2. She claimed she had been apprized that "an investment in which she holds an interest will undertake negotiations with the City of Orlando in the near future (p. 69-a)."

On Nov. 22, 2002, a fresh panel led by Judge Tjoflat rejected the FCA #1 appeals from Judge Fawsett's denials of sanctions (pp. 70-a/72-a). The panel stated that an earlier appeal (on the $20,000 judgment) barred revisiting the issue of Judge Fawsett's bias, although "these consolidated appeals challenge only the district court's orders" concerning ONIC and its counsel. The panel ruled that no exception to the law of the case doctrine warranted reconsideration (*id.*).

Petitioner's suggestion for hearing *en banc* resulted in a request for one by a member of the Court. Judge Tjoflat denied the petition since a majority of active Circuit Court judges had not voted in favor of it (p. 73-a).

Petitioner timely petitioned for a rehearing *en banc*. Meanwhile, on Jan. 14, 2003, Judge Fawsett after presiding below for nearly eight years, did what she and the Judge Tjoflat panels previously had refused to do. She removed herself from FCA #1, for the reason offered in FCA #2 months earlier (p. 74-a). Another FCA #1 recusal motion then was denied as moot by her judicial successor (p. 75-a).

For FCA #1, Judge Antoon was the successor. He refused to step aside as he had done in FCA #2 (p. 76-a). He relied on an opinion of Judge Anne Conway, who had refused to step aside in FCA #2 when she succeeded Judge Fawsett in September 2002 (*id.*). While Judge Antoon was being asked to reconsider his refusal to step aside, Judge Conway seemingly was vindicated in FCA #2 by an Eleventh Circuit two-member panel including Judge Dubina (pp. 79-a/80-a). Judge Antoon refused to reconsider, (p. 81-a) in part because of that Eleventh Circuit opinion.

On Mar. 25, 2003, the Judge Tjoflat panel finally was putting to rest the FCA #1 appeals from Judge Fawsett's denial of sanctions against ONIC or its counsel (p. 82-a). A separate order affirmed its refusal to consider a supplement to the record (p. 83-a). The supplement consisted of Judge Fawsett's recusals in FCA #1, FCA #2, and, on Dec. 31, 2002, in a third False Claims Act suit ("FCA #3). It was filed by Petitioner against Orlando, and ONIC's director[2].

On Apr. 1, 2003, the Judge Dubina panel still refused to remove Judge Conway from FCA #2, despite its review of a letter Petitioner had been given about a meeting to be coordinated by Orlando's former mayor between the judges and the federal agency responsible for the new federal courthouse (p. 84). However, despite Judge Dubina's panel support, and Judge Antoon's lauding of her reasoning, Judge Conway stepped down on May 1, 2003, in FCA #2 (pp. 85-a). Having been appointed district chief on Apr. 18, 2003, Judge Fawsett on May 6, sent FCA #2 specifically to Judge Kovachevich's domain in the Tampa Division (p. 86-a).

2–Judge Conway succeeded Judge Fawsett in FCA #3. Like Judge Antoon below here in FCA #1, she has declined to recuse herself, despite their respective recusals in FCA #2 (pp. 87-a/88-a).

Ex Parte Communications: re: Orlando, Courthouse

In September 1996, two months before the initial summary judgment in FCA #1, Congress appropriated $9.5 million for site acquisition for the Orlando U.S. Courthouse annex ("Project"). *The Orlando Sentinel* reported the delay of that initial funding for the Project, first proposed in 1994, because of a mis-targeted political vendetta (p. 89-a). Judge Fawsett personally had been notified about the money by a U.S. representative who had been a law partner in the private law firm representing Orlando defendants in FCA #1 and #2.

While FCA #1 judgment appeals briefing began in early 1998, Judge Fawsett, then Chief Judge Kovachevich and Richard Sletten, Clerk of the U.S. Court for the Middle District of Florida; Judge Joseph Hatchett, then Eleventh Circuit Chief Judge; Norman Zoller, then Eleventh Circuit Court Executive and Jack Chandler, then Eleventh Circuit Court architect, became involved in the planning for the Project (pp. 90-a/91-a). Then, on March 17, 1998, the Department through its Office of the U.S. Attorney in Orlando brought a condemnation suit to acquire the Project site (p. 91-a/92-a). The Project was the last in a series of new U.S. Courthouse facilities in the district, *id.* Tampa, subsequently Jacksonville, and Ft. Myers, now have new U.S. courthouses.

The condemnation suit was assigned to Judge Fawsett. She and Judge Kovachevich immediately contacted Judge Hatchett, to ask Chief Justice William Rehnquist to select a judge outside of the Eleventh Circuit to hear the suit. Judge Maurice Cohill of the U.S. Court for the Western District of Pennsylvania was assigned as Judge Fawsett's successor by April 7, 1998 (pp. 92-a/93-a).

By Apr. 1-2, Judge Fawsett and Judge Kovachevich were meeting with Bernhardt and Tom Kohler, Orlando's downtown development spokesperson (pp. 94-a/95-a).

Kohler made clear without contradiction that "we look forward to being included....in an ad hoc advisory capacity" to consider in part "questions about the annex's possible impacts on adjacent neighborhoods (p. 94-a, *supra*)." Judge Kovachevich replied: "If all interested parties work together in a cooperative manner, I am sure that we will build a facility of which we can all be very proud (p.95-a, *supra*)."

A month later an Eleventh Circuit panel was denying the motions for Orlando, Bernhardt, and ONIC, to dismiss the summary judgment appeal or strike portions of the brief (p. 31-a, *supra*). On July 28, 1998, *The Orlando Sentinel* reported that the Project site landholder appeared to be cooperating with Orlando for an entertainment, office, and housing complex in the surrounding area (p. 96-a). But by Sept. 2, *The Wall Street Journal* reported that the Project site landholder had no plans at all, but was holding the land for future sale (p. 97-a). On Oct. 5, the first Judge Tjoflat panel affirmed summary judgment and he denied the United States had been the real party in interest on the appeal (pp. 32-a/33-a, *supra*). By Oct. 28, *The Sentinel* was reporting Mayor Hood's admission that more than $40 million in federal, state, and local funding over 15 years had not helped the area surrounding the Project (p. 97-a).

In 1999, after the trial and appeals courts were decreeing that Respondents were entitled to fees from Mar. 25, 1994, as a matter of law, GSA was moving the Project Plan along, with the noted assistance of Orlando personnel, Judges Kovachevich and Judge Fawsett, Judge Dubina, and Judge Anderson, who succeeded Judge Hatchett, as chief, among other involved jurists. Sheryl Loesch, the new Clerk for the U.S. Court for the Middle District of Florida, also was involved in invitation-only meetings (pp. 98-a/101-a). By May 2000, session minutes indicated that discussions at the meetings necessarily focused on Orlando's area plans.

For their vision, judges were especially dependent on Orlando for Project parking arrangements (pp. 102-a/104-a).

But in 2000, as the magistrate was moving hearings on the amount of fees for Orlando and Bernhardt in FCA #1, serious disagreements took place between GSA and the judges about the Project. The judges enlisted Orlando personnel, including Mayor Hood and Kohler on their side (pp. 104-a/111-a). On Jan. 23, 2001, as she upheld the fee judgment, Judge Fawsett never mentioned meetings with Bernhardt, Orlando's Kohler, etc., or any other talks she was having with Orlando personnel including its mayor about the Project. Instead, she dismissed as merely ministerial *ex parte* contacts between her chambers and the law firm representing Orlando and Bernhardt (pp. 41-a/43-a. *supra*).

GSA and the judges eventually resolved their differences (p. 112-a) and the Project moved forward. Judge Antoon also did not mention the years of *ex parte* communications, or his own involvement in them, (p. 107-a) when he disqualified himself in FCA #2, or when he declined to do so in FCA #1. For FCA #2, Judge Fawsett did acknowledge meeting with the mayor and municipal officials, but only about the courthouse design. She never mentioned the ongoing invitation-only meetings, including her *ex parte* contact with Bernhardt and Orlando's Kohler, when she declined to step aside in FCA #2. After Judge Fawsett stepped aside in the FCA suits, but before she was chief, she again became a primary Project source (p. 112-a).

Petitioner first learned about the invitation-only meeting involving Judges Fawsett and Kovachevich, and Bernhardt and Kohler, when they were provided to him by the City on Mar. 28, 2003, in response to a Public Records Act request (pp. 113-a). They were fleshed out in the week of May 5, 2003, when GSA responded to his FOIA request of Mar. 26 (p. 114-a). He then moved to reopen FCA #1.

REASONS FOR GRANTING THE WRIT

I. THE APPEARANCE OF JUSTICE REQUIRES APPLICATION OF RULE 60(b), FEDERAL RULES OF CIVIL PROCEDURE, TO RELIEVE PETITIONER OF JUDGMENTS AND FINAL ORDERS BELOW.

An Eleventh Circuit panel cryptically cited Rule 60, Federal Rules of Civil Procedure, as well as its own rule for dismissal when an appeal is regarded as frivolous, in its attempt to close the door on FCA #1. The Court decision of Nov. 6, 2003, explicitly cut off a ruling on a pending suggestion for hearing *en banc*. The decision allowed for a petition for rehearing to be filed, but apparently not for a suggestion that the petition be reheard *en banc*. On Dec. 5, the Clerk returned the suggestion for rehearing *en banc*.

Had either *en banc* suggestion been heard, Judges Dubina and Anderson would have had to consider whether to participate, in light of Petitioner's allegations that their impartiality had been compromised by the *ex parte* communications concerning the Courthouse Project in which they had been involved with Orlando personnel about issues germane to the appeal. Confronted with those allegations in a petition for an writ of mandamus for reassignment of Judge Conway in FCA #3, those judges had declined to participate in *en banc* considerations. That petition was denied on Sept. 17, 2003. This Court has been asked to grant it, *In re H. Gabriel Kaimowitz*, #03-1021, *supra*.

In an appeal currently before the Eleventh Circuit in FCA #2, Judge Dubina on Feb. 19, 2004 again stepped aside when Petitioner presented evidence of the *ex parte* communications between judges and adverse parties. In 2003, also in FCA #2, Judge Dubina twice rejected Petitioner's offerings to disqualify Judge Conway, for her participation in the Project. He did not hint at his involvement, or his own knowledge of her participation..

But the judges knew they are required legally and ethically to step aside in any proceeding in which their impartiality might reasonably be questioned. See 28 U.S.C. §455a. In FCA #2, Judge Antoon already had stepped aside, albeit in response to a motion for recusal pursuant to 28 U.S.C. §144. The judge reasoned that a reasonable person might infer that the Orlando Division judges had a relationship with Orlando or Mayor Hood in the Project which would compromise the court's objectivity and fairness because of the support they had shown for the jurists. At the time, no court had been given the evidence now available about the years of ex parte communications between judges and Petitioner's adversaries about the Project and city plans.

> We conclude that in determining whether a judgment should be vacated for a violation of 455(a), it is appropriate to consider the risk of injustice in other cases, and the risk of undermining the public's confidence in the judicial process. We must continuously bear in mind that to perform its highest function in the best way "justice must satisfy the appearance of justice."

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 863-864 (1988).

Petitioner here relies on application of Rule 60(b)(6), Federal Rules of Civil Procedure ("Rule 60[b]") to seek relief from the rulings in favor of Orlando and Bernhardt by judges whose views of facts and law in these FCA surely may have been colored by their involvement in the Project. *Separately, because of the bifurcation of proceedings below and on appeal* about sanctions to be imposed on ONIC, Petitioner relies on Rule 60(b)(3), to be relieved from the rulings of Judge Fawsett on April 9, 2001, and June 8, 2001. Those were not finally resolved until March 26, 2003, when the Eleventh Circuit denied rehearings of her rulings.

Petitioner claims he is entitled to relief in the main, because of unprecedented undisclosed involvement of trial and appeals judges for years with Orlando personnel including Bernhardt in the Courthouse Project. They sought to harmonize City planning goals in the surrounding historically black neighborhoods with the judicial vision for the newest halls of justice. Also germane are the silence and misleading information given by judges and other court personnel at both levels to cover up that joint venture. The Project clearly involved more than a new courthouse; it was perceived from the outset by judges and Orlando personnel as a cornerstone of the city's planning effort to uplift the surrounding historically black neighborhoods. At issue in FCA #1 were false claims alleged to have been made to get federal funds improperly for those Southwest Orlando areas.

The collusion between jurists and parties apparently was intended to avoid or divert any public airing of the issues raised by Petitioner during the last decade. Any intimation of wrongdoing by Orlando in the area apparently has been perceived as jeopardizing the Project, which has been delayed for other reasons. Petitioner never before experienced, witnessed or even imagined such conduct by judges in more than 35 years of federal litigation practice in courts in the six federal circuits where he has been admitted.

But Petitioner is far from naive. He has blown the whistle on unlawful and unethical practices in several fields, *See* e.g., unethical taxpayer-funded intrusive brain surgery research without informed consent on institutionalized people, *Kaimowitz v. Michigan Dept. of Mental Health*, 42 U.S.L.W. 2063 (Wayne Co. Circuit Ct., three-judge court, 1973), and unlawful action by private and public officials to cover up non-compliance by a national bank with federal requirements for community reinvestment, *Kaimowitz v. Bd. of Gov. of the Fed. Res.*, 940 F.2d 610 (11th Cir. 1991).

Petitioner stresses that he faults neither Orlando, Bernhardt nor the judges for participation in the Project. But the judges knew or should have known before judgment in 1996 and certainly before imposition of fees in 1999 that they might be perceived as finding in favor of Defendants, because of bias, so that the Project would not be tainted, even by triable allegations of possible municipal wrongdoing.

Judges knowledgeable about the Project also knew appropriate ways to avoid such a cloud on their actions, if they wished to do so. For instance, they had acted quickly to have the aforementioned condemnation suit, *U.S. v. 3.864 Acres of Land*, #98-cv-308-Orl (M.D. FL 1998), reassigned to a district court judge outside of the circuit.

For FCA #1, Judge Fawsett opted to remain on the case and then relied on glittering generalities, to rule not only against Petitioner, but in effect to discourage if not bar the Department from pursuit of possible defendant wrongdoing.

> The question in such cases is whether the local taxpayer should make up for an undeserved benefit, or the federal taxpayer be permanently out of pocket, a question that can be answered in any given case, not by an opportunistic *qui tam* relator, but by a combination of the judge's discretion and the Government's power to intervene and dismiss or settle an action, see §3730(c)(2).
>
> *Cook County v. United States ex rel Chandler*, 123 S.Ct. 1239, 1247 (Mar. 10, 2003).

In *Liljeberg*, this Court allowed Rule 60(b)(6), to be used by those seeking to set aside a judgment by a judge who may have forgotten his extra-judicial actions favorable to one party. But Rule 60(b) does not allow two bites of the same apple, to set aside rulings made months or even years before discovery of new evidence, unless there are extraordinary circumstances and the petitioner is blameless.

To avoid such an eventuality, Relief under 60(b)(6) is only appropriate when none of the first five clauses of the rule are applicable. See *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 393 (1993). These provisions are mutually exclusive, and thus. e.g., a litigant who seeks to set aside a judgment obtained by fraud, misrepresentation or other misconduct of *an adverse party*, Rule 60(b)(3), may not seek relief more than a year after the judgment by resorting to subsection (6). *See also*, *Liljeberg*, 486 U.S. *supra*, at 863 , and n. 11 (1988).

Yet Petitioner *does seek to set aside the denials of sanctions against ONIC, pursuant to Rule 60(b)(3)*, because of the actions of that entity and its counsel to hide the fact that they knew the corporation all along was part of the Orlando enterprise, a false front, a decoy. For those claims, the time to set aside rulings in ONIC's favor does not begin to run until Mar. 25, 2003, when the Eleventh Circuit closed the door on further consideration of those denials[3], after deciding it would not reconsider recusal of Judge Fawsett.

Separately, Petitioner *does* rely on Rule 60(b)(6) to obtain relief *from those judgments for Orlando and Bernhardt*, because of misrepresentation or other misconduct *of the judges*. They did not disclose their extra-judicial activities in the Project. To justify relief under subsection (6), a party also must show "extraordinary circumstances" suggesting that the party is faultless in the delay. See *Pioneer*, 507 U.S. *supra*, at 393; *Ackerman v. United States*, 340 U.S. 193, 197 -200 (1950); *Klapprott v. United States*, 335 U.S. 601, 613 -614 (1949). Petitioner relies on the record to show he was faultless, while judges continued to cover up the trail of *ex parte* communications.

3–ONIC did not file an Answer Brief. The others did to oppose removal of Judge Fawsett, although they were not appellees.

The actions of Judges Fawsett and Antoon to avoid timely reference to their own Project participation with FCA #1 parties, went far beyond steps taken by the *Liljeberg* judge, while they were recusing themselves in FCA #2 but declining to do so in FCA #1. The *Liljeberg* jurist was removed for participation on behalf of a party, perhaps without his realization. Even the seventh judge presiding in FCA #2, in light of what he knew, expressed surprise that Judge Antoon had not stepped aside in FCA #1 (p. 87-a).

Even if a personal financial interest is not at stake, judges should step aside when they have any other interest that could be substantially affected by the outcome of the proceeding and they are active participants in the affairs of a party, 28 U.S.C. §455(b)(4) and (d). The Code of Conduct for United States Judges, p. 7, *supra*, also demands that judges step aside, even when they participate in non-remunerative law-related activities like those for the Project, if their participation casts reasonable doubt on their capacity to decide impartially any issue which might come before the judges. See *id.*, especially Canon 4.

Further, Judges Fawsett, Antoon, Kovachevich, (pp. 60-a/61a), Dubina--apparently acting as Eleventh Circuit Judicial Council Orlando Project representative--(p. 106-a), and Eleventh Circuit chief judges, have yet to address their Project participation, even when they have recused themselves in one or more of the three FCA suits considered here. Judge Fawsett did reveal in FCA #2 that she had met with municipal officials about the Project but she insisted that discussions were limited to courthouse design only. But until recusal was demanded on the basis of public reports, without the massive evidence which later surfaced, (e.g., pp. 94-a/105-a), Judge Fawsett did not even notify Petitioner of her extra-judicial participation with defendants, or earlier, with counsel about "ministerial matters" (pp. 41-a/43-a).

The judicial *ex parte* communications, without notice to Petitioner, and their cover-up should be enough to shock the conscience of one or more justices, *Cf. County of Sacramento, v Lewis*, 523 U.S. 833, 848, *et seq.* (1988). See, e.g., Justice A. M. Kennedy, "Judicial Ethics and the Rule of Law," 40 *St. Louis L. J.*, 1067 (1996).

> The essential rule of judicial relations concerning lawyers and litigants is this: a judge must be fair and impartial. All sides to a controversy must be given a full and fair hearing. As a consequence, a judge must not meet with an attorney or a party without the opposing attorney or parties present. The very nature of fair and open justice precludes either the fact or the appearance of a system in which essential communications occur without all sides present. We undermine respect for the judiciary if we allow it to be charged with adopting secret understandings or private agreements....Confidence in the entire system is eroded when the public sees a judge violating simple rules, for instance by communicating with only one party or hearing a case where there is a conflict of interest. Furthermore, all too often the appearance becomes the reality. If we do not maintain the appearance of neutrality, small deviations become the accepted norm, and as a consequence undermine the integrity of the judiciary.

Id., at 1069-70.

That view is fleshed out in cases in two other circuits in circumstances far less egregious than those described here. Each resulted in judicial reassignment, after the setting aside of a civil judgment in one instance, *In re James R. Edgar*, 93 F.3d 257 (7th Cir. 1996), and reversal of a criminal sentence in the other, *U.S. v. Craven*, 239 F.3d 91 (lst Cir. 2001).

II. DUE PROCESS OF LAW REQUIRED MEANINGFUL OPPORTUNITY TO BE HEARD IN OPPOSITION TO RULINGS FIRST ON APPEAL, THEN BELOW, THAT DEFENDANTS WERE ENTITLED TO ATTORNEY FEES.

This Court unanimously reversed judgment of attorney fees imposed below on an individual, and affirmed on appeal, in *Nelson v. Adams USA, Inc.*, 529 U.S. 460 (2000). A defendant awarded fees because of a frivolous suit by a one-man corporation successfully had judgment amended to include the individual as a party and the award immediately applied to him without giving him opportunity to answer. In constitutional terms, the procedures used failed to comply with due process of law.

Here, no demand or even suggestion for sanctions against Petitioner was made until after summary judgment was granted for defendants during the 1996 Thanksgiving Day week. A jury trial was to start the following week.

On March 26, 1997, the magistrate made no determination on the fees issues referred to him by Judge Fawsett. Instead he ruled that the issue should await decision by the 11th Circuit on the pending appeal. He conceded no fees might be justified at all (pp. 29-a/30-a).

Appellees moved to dismiss the appeal. On May 8, 1998, an Eleventh Circuit panel denied the motion. But after a one-page affirmance, another panel granted fees on appeal. Compare *Cooter & Gell v. Hartmarx Corp.*, 110 L.Ed.2d 359, 383, 496 U.S. 384 (1990)(Appellate determinations of frivolousness after appeals from Rule 11 sanctions below are said to be limited by Rule 38, Federal Rules of Appellate Procedure.) The Eleventh Circuit did not rely on Rule 38, but instead granted without citation appellees' motions for *entitlement* to fees. Appellees without case citation relied solely on the costs/fees provision at 31 U.S.C. §3730(d)(4).

On remand to determine the amount of fees for the appeal, the aforementioned magistrate decided in 1999 that the Eleventh Circuit had acted on the basis of that statute[4]. He further found pursuant to that law that the action itself had been clearly vexatious *from the outset*. So defendants were irrefutably presumed to be *entitled* to fees. (pp. 37-a/38-a). Judge Fawsett and the Eleventh Circuit thereafter rejected without explanation Petitioner's assertions that he should have some opportunity to be heard about the alleged *entitlement* to fees. Petitioner even opposed without success denial of any fee *amount* to ONIC, and demanded sanctions so he could refute its *entitlement* to fees, because the claims and appeals had not been frivolous. Application of the due process clause here would warrant Petitioner being entitled to the same opportunity to be heard, which was given to *Nelson*, *supra*.

CONCLUSION

For the above reasons, *certiorari* should be granted to review the dismissals of the Eleventh Circuit, and the decisions below should be summarily reversed, at least to allow Petitioner to show an impartial fact-finder why no defendant ever was entitled to attorney fees, and how and why ONIC had been used as a decoy, to avoid real judicial scrutiny of Petitioner's actual claims against defendants.

Respectfully submitted,

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4–Nothing in the statute or legislative history or case law suggests that the provision envisions its application by a court of appeals, without a prior ruling below based on 31 U.S.C.§3730(d)(4).

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
NOV 06 2003
THOMAS K. KAHN
CLERK

No. 03-14261-FF

GABE KAIMOWITZ,

Plaintiff-Appellant,

versus

ORLANDO, FL, RICK BERNHARDT, ORLANDO NEIGHBORHOOD IMPROVEMENT CORPORATION, ("ONIC"),

Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Florida

---

BEFORE: BIRCH, CARNES, and WILSON, Circuit Judges:

BY THE COURT:

On its own motion, the Court DISMISSES this appeal as frivolous. See Eleventh Circuit Rule 42-4; Federal Rule of Civil Procedure 60(b). All remaining pending motions are DENIED AS MOOT. The Clerk is directed to return unfiled any future documents tendered by Appellant in this appeal, with the exception of a timely filed motion for reconsideration.

UNITED STATES COURT OF APPEALS
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

In Replying Give Number
Of Case and Names of Parties

December 05, 2003
Gabe Kaimowitz
P.O. Box 140119
Gainesville, FL 32614

RE: 03-14261-FF Gabe Kaimowitz v. Orlando, Fl.
DC DKT NO.: 95-00204 CV-ORL-28DAB

The following action has been taken in the referenced case:

IN CONSISTENT WITH THE COURT'S NOVEMBER 6, 2003 ORDER, YOUR SUGGESTION FOR REHEARING EN BANC IS BEING RETURNED UNFILED.

Sincerely,

THOMAS K. KAHN, Clerk
Reply TO: Carol P. Lewis
(404) 335-6175

MOT-2 (11-2003)

UNITED STATES DISTRICT COURT FILED
MIDDLE DISTRICT OF FLORIDA 2003 JULY 23 PM 2:16
ORLANDO DIVISION CLERK, U.S.
DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO,FLORIDA

GABE KAIMOWITZ,
Plaintiff,
-vs- Case No. 95-204-CIV-ORL-28DAB

ORLANDO, FLORIDA; RICK BERNHARDT,
its planning and development director,
and the ORLANDO NEIGHBORHOOD
IMPROVEMENT CORPORATION,
Defendants.

ORDER

Qui Tam Plaintiff, Gabe Kaimowitz, has filed a Motion to Set Aside Judgment(s) Obtained by Fraud, Misrepresentation (Doc. No.. 706) to which Defendants, Orlando, Florida, and Rick Bernhardt, have filed their Response (Doc. No. 709). The motion, filed June 13, 2003, seeks to set aside the Summary Judgment entered November 26, 1996 (Doc. Nos. 442-443), and a judgment for fees entered against Qui Tam Plaintiff and in favor of Defendants on July 9, 1999 (Doc. No. 567). The Motion to Set Aside Judgment must be denied because it was not timely filed.

Qui Tam Plaintiff originally filed a Complaint seeking relief under the False Claims Act, 31 U.S.C., § 3729, et seq,. District Judge Patricia C. Fawsett determined there were no material issues of fact and granted summary judgment in favor of Defendants on November 26, 1996 (Doc. Nos. 442-443). The Qui Tam Plaintiff appealed this ruling, but the Eleventh Circuit affirmed Judge Fawsett's order (Doc. No. 551). Following the affirmance, Defendants moved the Eleventh Circuit for an award of attorney's fees and costs, pursuant to 31 U.S.C. §3730(d)(4), on grounds the case was "clearly frivolous and vexatious." The motion for fees and costs was granted on February 15, 1999, and the matter was remanded to the district court to determine a reasonable fee

(Doc. No, 561). On March 2, 1999, Defendants also filed a motion to tax fees and costs for work done in the trial court (Doc. No. 554).

Magistrate Judge David Baker considered the issue of fees and costs. After hearings on this issue, Judge Baker recommended that Defendants be awarded attorney's fees of $20,000. Judge Fawsett approved the recommendation and on January 25, 2001, judgment was entered (Doc. No. 635-636). Qui Tam Plaintiff appealed this order, which was affirmed by the Eleventh Circuit on April 22, 2002 (Doc. No. 672).

Qui Tam Plaintiff now moves to set aside the judgments. In support of his motion, he has made repeated allegations of conspiratorial judicial misconduct in relation to a newly proposed federal courthouse in Orlando. These vague allegations are not only leveled against district judges in Orlando, but are also directed against judges on the Eleventh Circuit Court of Appeals. Judges of this court, as well as the Eleventh Circuit, previously addressed these allegations, and it is not necessary to address them again, because Qui Tam Plaintiff's motion is untimely.

Qui Tam Plaintiff's motion is brought pursuant to Rue 60(b), Federal Rules of Civil Procedure. The rule provides that a motion seeking relief from an order or judgment obtained by fraud must be filed "not more than one year after the judgment, order was -2- entered or taken." In this case, the Summary Judgment was entered on November 26, 1996, and the order for fees and costs was entered July 9, 1999; thus they were entered substantially more than one year prior to the filing of the instant motion on June 13, 2003. Accordingly, it is ORDERED

Qui Tam Plaintiff's Motion to Set Aside Judgment(s) Obtained by Fraud, Misrepresentation (Doc. No. 706) is **DENIED. DONE and ORDERED** in Chambers, Orlando, Florida this 23 day of July 2003.

John A———
JOHN ANTOON II
United States District Judge

Copies furnished to:
Counsel of Record
Unrepresented Party

-3-

UNITED STATES DISTRICT COURT FILED
MIDDLE DISTRICT OF FLORIDA2003 SEP 17PM1:31
ORLANDO DIVISION CLERK, U.S.
DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

GABE KAIMOWITZ,
Plaintiff,

-vs- Case No. 95-204-CIV-ORL-28DAB

ORLANDO, FLORIDA; RICK BERNHARDT, its planning and development director, and the ORLANDO NEIGHBORHOOD IMPROVEMENT CORPORATION,
Defendants.

ORDER

This cause came on for consideration without oral argument on Plaintiff's Motion/Memo of Law to Set Aside Order of July 23, 2003, or for Entry of an Order Directing Plaintiff to Show Cause at a Court Hearing Why He Should Not Be Sanctioned for Filing Papers Contrary to Rule 11, Federal Rules of Civil Procedure, as Amended in 1993 (Doc. 711, filed July 31, 2003). After review of this matter, it is ORDERED that:

Plaintiff's Motion to Set Aside Order of July 23, 2003, or for Entry of an Order Directing Plaintiff to Show Cause at a Court Hearing Why He Should Not Be Sanctioned for Filing Papers Contrary to Rule 11, Federal Rules of Civil Procedure as Amended in 1993 (Doc. No.711) is **DENIED**.

DONE and ORDERED in Chambers, Orlando, Florida this 17th day of September, 2003.

John A----------
JOHN ANTOON II
United States District Judge

Copies furnished to:
Counsel of Record
Unrepresented Party

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-12900-R

SEALED
FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
SEP 17 2003
THOMAS K. KAHN, CLERK

IN RE: GABE KAIMOWITZ, Petitioner.

On Petition for Writ of Mandamus to the United States District Court for the Middle District of Florida

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before: CHIEF JUDGE EDMONDSON, AND JUDGES TJOFLAT, BIRCH, BLACK, CARNES, BARKETT, HULL, MARCUS, and WILSON, Circuit Judges.*

PER CURIAM:

The Petition for Rehearing is DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition for Rehearing En Banc is DENIED. ENTERED FOR THE COURT:

Gerald Bard Tjoflat
UNITED STATES CIRCUIT JUDGE

*Judges Anderson and Dubina did not participate in this decision. **SEALED BY COURT ORDER.**

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED,U.S. COURT OF APPEAL
ELEVENTH CIRCUIT, FEB 19 2004
THOMAS K. KAHN CLERK

No. 03-15344-FF,

UNITED STATES OF AMERICA, ex relator, ATTORNEYS AGAINST, by Gabe Kaimowitz, qui tam, Plaintiffs-Appellants, versus **CITY OF ORLANDO, FL, GLENDA E. HOOD,** individually, Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Florida

ORDER: 'Appellant's "Motion to Disqualify...," which is construed as a motion seeking my recusal from participation in this appeal is *granted.*

Joel F. Dubina,
United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

---------- FILED,U.S. COURT OF APPEAL
No. 03-15344-FF, ELEVENTH CIRCUIT, FEB 26 2004
---------- THOMAS K. KAHN CLERK

UNITED STATES OF AMERICA, ex relator, ATTORNEYS AGAINST, by Gabe Kaimowitz, qui tam, Plaintiffs-Appellants, versus **CITY OF ORLANDO, FL, GLENDA E.HOOD** individually, Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Florida

ORDER: 'Appellant's "Motion to Disqualify...,"which is construed as a motion seeking my recusal from participation in this appeal is DENIED as moot in light of the apparent availability of ample other judges of the court whose impartiality is not questioned and in light of my direction to the Clerk not to assign the instant appeal to me as an administrative matter taken in the interests of judicial economy (to avoid the necessity of requiring appellant to supplement his motion specifying in detail how my involvement in administrative matters relating to the design of the new Orlando Courthouse project could affect my partiality vel non with respect to the instant appeal and to avoid further delaying this matter). Appellant is directed to include such detail if and when he moves for recusal in the future in this case or any other case on these grounds.

R. Lanier Anderson,
United States Circuit Judge

UNITED STATES DISTRICT COURT FILED
MIDDLE DISTRICT OF FLORIDA 95 FEB 15 PM 3:42
JACKSONVILLE DIVISION CLERK, U.S.
DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE, FLORIDA

UNITED STATES OF AMERICA,
ex rel. GABE KAIMOWITZ, esq.,
Qui Tam,
Plaintiffs,
-vs- CASE NO. 94-284-Civ-J-10

ORLANDO, Fla., RICK BERNHARDT,
its planning and development director,
and the ORLANDO NEIGHBORHOOD
IMPROVEMENT CORPORATION,
Defendants.

ORDER

Plaintiff has filed a qui tam complaint for equitable relief and damages allowed by the False Claims Act. The complaint alleges that the Defendants "have made claims violative of federal law to induce Community Bloc Grant Development ("CDBG") funds and other grants and loans from the U.S. Department of Housing and Urban Development ("HUD"), and the complaint also seeks "injunctive relief to bar use of such funds for maintenance and expansion of a commercial district, low-income public housing, and alleged rehabilitation of multi-family low-income rental units in virtually all black neighborhoods of Orlando."

As a preliminary matter, the Plaintiff's motions to file this case under seal and to delay service of process (Docs. 2 & 3) have not yet been ruled on by the Court, although this case has proceeded under seal while the government considered whether to intervene. Upon due consideration, the motions (Doc;. 2 & 3) are GRANTED and Plaintiff's

service upon the Defendants is deemed to be timely and this case will remain under seal except as ordered below.

Plaintiff also filed a motion to disqualify U.S. Attorneys in Jacksonville and Orlando, and others in the U.S. Department of Justice in Washington, D.C., who have been or are associated with Larry Colleton, Former U.S. Attorney, Middle District, Fla. (Doc. 9) and the government responded in opposition to the motion (Doc. 15). Upon due consideration, the motion is DENIED.

The United States has filed a notice of election to decline intervention (Doc. 17). The notice also requests, under 31 U.S.C. § 3730, that the Court not dismiss this action without the consent of the United States and that the parties be required to serve all pleadings on the United States. Upon due consideration, these requests are GRANTED and the Plaintiff and Defendants are directed to serve all future pleadings on the United States, and are directed to file in conjunction with any motion seeking the dismissal of this action, a motion for approval by the United States of the proposed dismissal. Further, the United States may order transcripts or may elect to intervene at a future time for good cause shown as allowed under 31 U.S.C. § 3730.

Plaintiff has also filed a motion to unseal the record (Doc. 19). Upon due consideration, the motion is GRANTED to the extent that the clerk is directed to unseal the complaint (Doc. 1), Plaintiff's return of service (Docs. 21-23), and all of the pleadings filed subsequent to the returns of service (Docs. 24-36). Further, this Order and all future pleadings should be filed in the **2** public file, but the remaining pleadings (Doc. 2-20) shall remain under seal.

IT IS SO ORDERED.

DONE AND ORDERED at Jacksonville, Florida this *15th* day of February, 1995.

WmTerrellHodges
UNITED STATES DISTRICT JUDGE

Copy to counsel of record **3**

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

FILED
95 FEB 27 PM 2:49
CLERK, U.S.
DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE, FLORIDA

UNITED STATES OF AMERICA,
ex rel. GABE KAIMOWITZ, esq.,
Qui Tam,
Plaintiffs,
-vs-

CASE NO. 94-284-Civ-J-10

ORLANDO, Fla., RICK BERNHARDT,
its planning and development director,
and the ORLANDO NEIGHBORHOOD
IMPROVEMENT CORPORATION,
Defendants.

ORDER

Defendants City of Orlando and Richard Bernhardt fileds a motion for change of venue (Doc. 26), and the remaining Defendant, Orlando Neighborhood Improvement Corporation, filed its own separate motion for change of venue (Doc. 28). Plaintiff responded to both motions (Docs. 29, 30, and 31) and filed a notice of filing (Doc. 34) and an affidavit (Doc. 33) related to the venue issue. Defendants have moved (Docs. 35 & 37) to strike Plaintiff's notice of filing and affidavit.

Plaintiff's qui tam complaint seeks equitable relief and damages allowed by the False Claims Act. The complaint alleges that the Defendants "have made claims violative of federal law to induce Community Bloc Grant Development ("CDBG") funds and other grants and loans from the U.S. Department of Housing and Urban Development ("HUD")," and the complaint also seeks "injunctive relief to bar use of such funds for maintenance and expansion of a commercial district, low-income public housing, and alleged rehabilitation of multi-family low-income public housing, and alleged rehabilitation, of multi-"

"family low-income rental units in virtually all black neighborhoods of Orlando."

Defendants seek a change of venue under 28 U.S.C. §1404 arguing that Orlando is the better venue because Defendants are located in Orlando and transact the majority of their business there, and because all of the recipients of the allegedly falsely claimed funds are also located in Orlando. Plaintiff opposes a change of venue in this case for three principal reasons. First, Plaintiff contends that all of the documents related to the alleged false claims are located in Jacksonville because the Defendants made all of these claims to the Jacksonville office of the United States Department of Housing and Urban Development ("HUD") which processed the claims in and dispersed the funds from Jacksonville. Second, Plaintiff contends that the Judge and jurors residing in Orlando will be biased because this case includes claims against the City of Orlando. Third, Plaintiff argues that in Orlando, "an all, or assuredly predominantly white jury...would resolve...to keep the local black population in its place."

Under 31 U.S.C. § 3732, venue in a case under the false claims act is proper:

> in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred.

Under this section, venue is proper in either Jacksonville or Orlando. Under 28 U.S.C. § 1404, the Court can transfer venue to any other district or division where the action might have been brought, **2** if a transfer would serve the convenience of the parties and witnesses and the interest of justice. Ordinarily, a plaintiff's choice of forum is entitled to considerable weight when a Court (decides) whether to order a change of venue. However, in a false claims act case, a qui tam plaintiff's choice is entitled to relatively little weight because the plaintiff is asserting the rights of the real party in interest, the United States. United States ex rel LaValley v. First National Bank of Boston, 625 F. Supp. 591, 594 (D. N.H. 1985).

Within the preference ordinarily given to a plaintiff's choice of forum, it is apparent that venue is more appropriate in the Orlando division. All of the Defendants, as well as the officers and employees of the Defendants, reside in Orlando. Moreover, the recipients of the funds acquired through the allegedly false claims, who can be expected to be witnesses in this action, all reside and conduct business in Orlando. Finally, Plaintiff is a Gainesville resident, and, therefore, will not be significantly inconvenienced if forced to litigate this matter in Orlando rather than Jacksonville. For all of these reasons, the Court finds that a transfer to the Orlando division would serve the convenience of the parties and witnesses and the interest of justice.

Accordingly, upon due consideration:

(1) The Defendants' motions to transfer venue (Docs. 26 & 28) are GRANTED and the clerk is directed to transfer this case to the Orlando division; and

(2) Defendants' motions to strike (Docs. 35&37) are DENIED.

IT IS SO ORDERED.

DONE AND ORDERED at Jacksonville, Florida this 27th day of February, 1995.

WmTerrell Hodges

UNITED STATES DISTRICT JUDGE

Copy to counsel of record

TRANSCRIPT OF PROCEEDINGS (Excerpt)
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
CASE NO.: 95-204-CIV-ORL-19

GABE KAIMOWITZ, ET AL.,

PLAINTIFF(S),

vs.

ORLANDO, FLORIDA; ET AL.,

DEFENDANT(S)

FINAL PRE-TRIAL CONFERENCE

BEFORE: DAVID A. BAKER,
U.S. MAGISTRATE JUDGE

DATE: NOVEMBER 12, 1996

TIME NOTED: 2:02-2:43 P.M.

UNITED STATES COURTHOUSE
80 NORTH HUGHEY AVENUE
ORLANDO, FLORIDA 32801

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TRANSCRIPT EXCERPTS (*starting at line 8, page 10*):
(THE COURT): Let's deal with the Motion for Mediation first, I guess. The Defendants have indicated no opposition to the Motion....(*starting at line 17, page 14*): Well, I guess I don't want to conduct it myself, although, as you (Kaimowitz) noted, we had a pretty good mediation in another case a couple of years ago. But because there may still be matters coming before me to be resolved, I would prefer not to conduct it myself. Judge Glazebrook and I have swapped mediations for each other on other cases we have....(*starting at line 22, page 17*): Let me talk to Judge Glazebrook. Mr. Kaimowitz,...I remember the case we handled before. I thought beforehand there was little chance we would resolve it and I was, as you were, pleasantly surprised, and I think the City was happy with the result....Given the level of tension of this case, I have no reason to suppose that this case will settle. But on the other hand, if the Defendants don't object and you think it's going to be productive, there's no reason not to. Let me check with Judge Glazebrook to see if he's available. If not, what I would do is notify the parties of that and let you bandy some names back and forth. There should be some folks from the Melbourne/Daytona Beach Area that you mutually have some confidence in who would be willing to come over here....It can't be much more than a guess as to how long you think it would take to kind of air out the issues and see whether there's some common ground....(*starting at line 20, page 31*). All right. I will enter an Order memorializing the rulings I've made on the Motions. I'll consult with Judge Glazebrook and see about his availability to serve as a mediator in the case....(*starting at aline 5, page 32*).
MR. KAIMOWITZ: Your Honor, do I understand that the Motion for Mediation is granted regardless of how it's resolved with Judge Glazebrook?
THE COURT: Right. If he's not available, then I'll notify you and give you a couple of days to see if you can't pick somebody that you can both of you agree on and that you can get in front of in a timely fashion. We're in recess.
(*Ending at line 15, page 32.*)

UNITED STATES DISTRICT COURT FILED
MIDDLE DISTRICT OF FLORIDA 96 NOV 14 PM 3:54
ORLANDO DIVISION CLERK, U.S.
DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

UNITED STATES OF AMERICA, ex rel.
GABE KAIMOWITZ, Esq., Qui tam, ("Qui Tam"),
Plaintiffs,
-vs- Case No. 95-205-CIV-ORL-19

ORLANDO, FLORIDA; RICK BERNHARDT,
its planning and development director, et al.
Defendants.

ORDER

This cause came on for consideration with oral argument on the following motions filed herein:

MOTION: PLAINTIFF'S MOTION TO MODIFY CASE MANAGEMENT AND SCHEDULING ORDER (#344)

FILED: September 3, 1996
THEREON it is ORDERED that the Motion is GRANTED. The Court's calendar will reflect that the parties now estimate that this case will take up to 12 days to try.

MOTION: PLAINTIFF'S MOTION FOR MEDIATION (#371)
FILED: October 21, 1996
THEREON it is ORDERED that the Motion is GRANTED. Judge James G. Glazebrook will conduct a settlement conference with the parties....
DONE and ORDERED in Orlando, Florida on November 14, 1996.

David A. Baker
DAVID A. BAKER
UNITED STATES MAGISTRATE JUDGE

TRANSCRIPT OF PROCEEDINGS (Excerpt)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
CASE NO.: 95-204-CIV-ORL-19

UNITED STATES OF AMERICA, EX REL.
GABE KAIMOWITZ, ESQ., QUI TAM
("QUI TAM"),
PLAINTIFF(S),

vs.
ORLANDO, FLORIDA; RICK BERNHARDT;
AND THE ORLANDO NEIGHBORHOOD
IMPROVEMENT CORPORATION ("ONIC"),
DEFENDANT(S)

SETTLEMENT CONFERENCE

BEFORE: JAMES G. GLAZEBROOK
U.S. MAGISTRATE JUDGE

DATE: NOVEMBER 21, 1996

TIME NOTED: 11:00 A.M.–11:35 A.M.
2:35 P.M.–2:30 P.M.
UNITED STATES COURTHOUSE
80 NORTH HUGHEY AVENUE
ORLANDO, FLORIDA 32801

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(*Excerpt starting at page 26, line 5*)

MR. GRICKE[1]: Your Honor?

THE COURT: Yes.

MR. GRICKE: Just a brief point of clarification. My concern about the release language for purposes of settlement also involves the pre-trial statement. There are arguably, at least, from the Department's view, certain contentions in the pre-trial that are not part of Mr. Kaimowitz's original complaint in this action and the government would not be willing to release any liability with respect to those claims.

THE COURT: I notice the government didn't sign the pre-trial stipulation and all prior pleadings are no longer effective. They are all merged into the pre-trial stipulation under Local Rule. So you can preserve your objections. I don't need to address that at this time.

MR. GRICKE:....One possible way of getting around that concern, **27** assuming that settlement is reachable, is that the United States would be willing to consent to the release of claims without prejudice to the government, and with prejudice to the Relator. That is something we have done in the past in certain situations and might facilitate settlement here as well.

THE COURT: All right. All right. If I need to call you, I'll give you a call and treat the United States as if they were a party even though they have not moved to intervene in the sense that I'll speak with you ex-parte about settlement matters. All right. We'll stand adjourned. And the balance of this proceeding will be off the record, settlement discussions in chambers. Hearing is adjourned.

* * *

THE COURT: We tried to reach counsel for the United States and he's not available by telephone. The remaining parties are represented through counsel who appeared earlier. In the interim, since the last hearing, we had several meetings...No settlement was reached....

1–Stephen J. Gripkey, then an attorney with the U.S. Department of Justice in Washington, D.C., appeared for the United States at this settlement conference.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
UNITED STATES OF AMERICA, ex rel.
GABE KAIMOWITZ,
Plaintiffs
v. No. 95-204-Civ-Orl-19
(Judge Fawsett)
ORLANDO, FLORIDA, RICK BERNHARDT, and the ORLANDO NEIGHBORHOOD IMPROVEMENT CORPORATION ("ONIC")
Defendants.

This is a qui tam action against the above-named defendants initiated by Gabe Kaimowitz ("relator"), pursuant to the False Claims Act ("FCA"), as amended 31 U.S.C. § 3729, et seq..

The United States filed its Notice of Election to Decline Intervention on September 26, 1994. On February 15, 1995, the Court ordered the relator and defendants to serve all future pleadings on the United States, and directing them to file, in conjunction with any motion seeking the dismissal of this action, a motion for approval by the United States of the proposed dismissal. The Court further ordered that the United States may order transcripts and elect to intervene at a future time for good cause shown as allowed under 31 U.S.C. § 3730(d)(3). See Order, February 15, 1995 (J. Hodges).

Trial is currently set for December 2, 1996, although relator's schedule makes it likely that trial will not start until December 3, 1996. Mr. Kaimowitz is both the relator and an attorney with the Florida bar. The defendants are: the city of Orlando, Florida, Richard Bernhardt, the city's planning and development director; and the Orlando Neighborhood Improvement Corporation ("ONIC"), a non-profit entity that uses federal funds for community development. The original qui tam complaint alleges that

defendants have made false representations in obtaining and applying federal funds, primarily Community Development Bloc Grant ("CDBG") funds from the Department of Housing and Urban Development ("HUD"). The original complaint makes a number of allegations against defendants.
NOV-21-1996 18:08 2025140280 91% P.03

NOV-25-1996 17:29 OIG OFFICE OF COUNSEL P.05

Attorney-client privileged p. 3

1) Until at least January 1993, ONIC falsely claimed to be a private not-for-profit agency eligible to receive certain HUD funds when in fact it was and is a public not-for-profit alter ego of Orlando. Most of its members are city employees or agents. 2) From 1988 through September 1993, Orlando and ONIC have falsely sought HUD funds for certain entities (such as "Red's Bar-B-Que") that were ineligible for such grants. 3) Orlando has falsely certified it is in full compliance with HUD rules and regulations even though it has not kept adequate documentation for grants received from HUD for its rental rehabilitation programs, and in 1993 refused to reveal such documentation to relator; an accounting would "likely" reveal wasted federal funds. 4) Orlando has falsely claimed it has a public process to receive and consider citizen input on CDBG grants, when it in fact barred or limited public discussion on the use of such grants. Contrary to representations made to HUD, elected city officials have rarely participated in discussions. Instead, they have just adopted minutes of Orlando's volunteer municipal planning board, which usually accepted in full and without discussion the recommendations of Bernhardt and his staff. 5) Contrary to HUD regulations and guidelines, Orlando and Bernhardt have falsely misrepresented to HUD that federal funds for the Parramore Heritage Renovation Project will not create an undue concentration of poor people and blacks in the affected area. 6) In order to obtain HUD funds, Orlando has falsely certified that the use of such money will not create undue concentrations of poor people and blacks in affected areas.

....NOV-21-1996 18:09 2025140280 91% P.04

UNITED STATES DISTRICT COURT **FILED**
MIDDLE DISTRICT OF FLORIDA **96NOV 26AM10:46**
ORLANDO DIVISION CLERK, U.S.
DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

UNITED STATES OF AMERICA,
ex rel. GABE KAIMOWITZ, Esquire, Qui Tam,
Plaintiff,

-vs- CASE NO. 95-204-CIV-ORL-19

ORLANDO, FLORIDA; RICK BERNHARDT,
its planning and development director,
and the ORLANDO NEIGHBORHOOD
IMPROVEMENT CORPORATION,
Defendants.

ORDER

This cause came before the Court on the following: (1) Qui Tam Plaintiff's Motion/Legal Authority for a Judge Outside the Orlando Division to Hear this Proceeding (Doc. Nol. 390, filed November 4, 1996), and Defendants' Memorandum of Law in Opposition to Motion/Legal Authority for a Judge Outside the Orlando Division to Hear this Proceeding (Doc. No. 415, filed November 12, 1996). This is qui tam Plaintiff's third motion for recusal of the undersigned Judge. On March 16, 1995 (Doc. No. 71) and August 23, 1996 (Doc. 342), this Court entered Orders denying qui tam Plaintiff's previous motions for recusal. Despite its comments directed toward the undersigned Judge, qui tam Plaintiff's new motion for recusal has not offered any new or different information than its previous motions which would cause this Court to alter its previous decisions. Thus, qui tam Plaintiff's Motion for a Judge Outside the Orlando Division is DENIED. (2) Defendant Rick Bernhardt and Orlando, Florida's Motion for Summary Judgment (Doc. No. 356, filed October 11, 1996), Defendants' Memorandum of Law in Support of Motion for Summary Judgment (Doc. No. 357, October 11, 1`996), Affidavit of Richard Bernhardt (Doc. No. 359), Affidavit of James M. Lane (Doc. No. 361), Motion of Orlando Neighborhood Improvement Corporation, Inc., for Summary

Judgment in its Favor (Doc. No. 367), filed October 15, 1996), Memorandum of Orlando Neighborhood Improvement Corporation, Inc., in Support of its Motion for Summary Judgment (Doc. No. 368, filed October 15, 1996), Qui Tam Plaintiff's Opposition to Motions for Summary Judgment by Orlando Neighborhood Improvement Corporation, and for Orlando and its Planning Director Richard Bernhardt, and the Latest Motion to Strike by the Latter (Doc. No. 420, filed November 12, 1996), Notice of Filing Deposition of City Defendants' Excerpt, October 1, 1996 and Public Documents Calling Into Question His Credibility (Doc. No. 421, filed November 12, 1996), and Notice of Filing News Reports and Public Documents to Show Defendants Knowingly Made False Claims In Violation of Federal Law to Obtain Federal Funds to Foster Poor Black Ghetto (Doc. No. 423, filed November 12, 1996). Summary judgment is authorized "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party **2** is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); accord Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). Summary judgment is appropriate only in circumstances where "the evidence is such that a reasonable jury could (not) return a verdict for the non-moving party." *Id.* at 248. The moving party bears the burden of proving that no genuine issue of material fact exists. Celotex v. Catrett, 477 U.S. 317, 323 (1986). In determining whether the moving party has satisfied the burden, the Court considers all inferences drawn from the underlying facts in the light most favorable to the party opposing the motion, and resolves all reasonable doubts against the moving party. Anderson, 477 U.S. at 255. On a summary judgment motion the Court may not weigh conflicting evidence or weigh the credibility of the parties. See Hairston v. Gainesville Sun Pub. Co., 9 F.3d 913, 919 (11th Cir. 1993)(citation omitted). If a reasonable fact finder could draw more than one inference from the facts and that inference creates an issue of material fact, then the Court must not grant summary judgment. *Id.* (cite omitted).

All Defendants have moved for summary judgment on qui tam Plaintiff's Complaint alleging violations under the False Claims Act, 31 U.S.C. § 3729-3733. The elements of a claim under section 3729 (a)(1) of the False Claims Act are: (1) that the defendants presented or caused to be presented to an agent of the United States a claim for payment; (2) that the claim was **3** false or fraudulent; (3) that the defendant knew the claim was false or fraudulent; and (4) that the United States suffered damages as a result of the false or fraudulent claims. United States ex rel Stinson, Lyons, Gerlin, & Bustamante, P.A. v. Provident Life & Accident Ins. Co., 721 F. Supp. 1247, 1258-1259 (S.D. Fla. 1989). The knowledge element of this claim is defined in 31 U.S.C. §3729(b), which states in part:

> the term "knowing" and "knowingly" mean that a person, with respect to the information–(1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information, and no specific intent to defraud is required.

"Mere negligence or innocent mistake is insufficient to satisfy the above standards for knowledge." Wilkins ex rel United States v. State of Ohio, 885 F. Supp. 1055, 1059 (S.D. Ohio, 1995)(citing United States ex rel Hagood v. Sonoma County Water Agency, 929 F.2d 1416, 1421 (9th Cir. 1991), aff'd 81 F.3d 1465, *cert. denied*, 117 S.Ct. 175 (1996)). The violation is not the intent to deceive the government, but the knowing presentation of a claim, record, or statement which is either fraudulent or false. *Id.* at 1060. Defendants content that qui tam Plaintiff has failed to identify any specific claim or claims made by Defendants which was or were false or fraudulent. Further, qui tam Plaintiff has failed to present any evidence which would demonstrate the manner in which Defendants knew or should have known that any claims were fraudulent at the time that they were made. This Court agrees. **4**

Qui tam Plaintiff listed alleged false claims made by Defendants in his original complaint (Doc. No. 1), in Section XVIII of the Joint Pretrial Statement (Doc. No. 382), and

the amended Section XVIII (Doc. No. 432). Thousands of pages of documents, deposition transcripts, affidavits, newspaper articles, collages, and other paperwork have also been submitted by Plaintiff, including but not limited to the six volumes filed with one of qui tam Plaintiff's motions for summary judgment (Doc. No. 312), the Supplemental Authority to one of qui tam Plaintiff's motions for summary judgment (Doc. No. 341), the Supplement to qui tam Plaintiff's Complaint (Doc. No. 346), the statement of Phil Cowherd in Plaintiff's Notice of Expert Disclosure (Doc. No. 349), qui tam Plaintiff's Opposition to Motions for Summary Judgment by ONIC, and for Orlando and its Planning Director Richard Bernhardt (Doc. No. 420), qui tam Plaintiff's Notice of Filing Deposition of City Defendant's Expert, Oct. 1, 1996, and Public Documents Calling Into Question his Credibility (Doc. No. 421), and qui tam Plaintiff's Notice of Filing News Reports and Public Documents to Show Defendants Knowingly Made False Claims in Violation of Federal Law to Obtain Federal Funds to Foster a Poor Black Ghetto (Doc. No. 423). Much of this paperwork was repetitious, and most of it was irrelevant to the list of false claims alleged by qui tam Plaintiff. Further, qui tam Plaintiff has failed to direct the Court to any particular documentation which demonstrates evidence of a false or fraudulent claim(s) made by any of these Defendants, or which demonstrates any knowledge by these **5** Defendants ord any false claim(s).

The City of Orlando ("Orlando") and Richard Bernhardt ("Bernhardt") have presented evidence which demonstrates that they have taken all reasonable efforts, including internal and external audits, to ensure substantial compliance with all applicable federal laws which Orlando obtained federal funding for any project. The affidavits of James Lane and Mr. Bernhardt further state that they are unable to find any evidence of false claims made by any Defendants to the federal government and that they have no knowledge of any false claims made to the federal government. (Note 1–*Contrary to the assertion of qui tam Plaintiff, the Court finds that the affidavit of Mr. Lane does not contradict his deposition testimony.*) See Doc. Nos.

359 and 361. The Orlando Neighborhood Improvement Corporation ("ONIC") submitted the affidavit of Robert Ansley, Executive Director and President of ONIC, who testified that he never had any knowledge of any federal funds received by ONIC which were not in compliance with the requirements of Title VI of the Civil Rights Act of 1964, and the Fair Housing Act. (Doc. No. 368, Ansley Aff.; para. 16). Plaintiff has not submitted any evidence which contradicts any of these affidavits.

Further, contrary to the assertions of qui tam Plaintiff, the multiple deposition transcripts submitted by qui tam Plaintiff appear to demonstrate that Defendants took all reasonable efforts to comply with federal law in the (footnote 1 included) **6** disbursement of federal funds. It appears that whenever there was a question by the government regarding the proper use or disbursement of funds, Defendants took action to correct any potential problem, including the reimbursement of funds to the federal government. The evidence submitted can only lead a reasonable person to one conclusion: that Defendants took actions they believed were permissible under the law and which complied with directives or recommendations made by the federal government. See United States v. Lazy F C Ranch, 324 F. Supp. 698, 700 (D. Idaho 1971), *aff'd* 481 F.2d 985 (9th Cir. 1973). Qui tam Plaintiff seems to assert that any inquiry made by the federal government, any reimbursement made to the federal government by any Defendant, or any federal funds which were unspent by any Defendant is evidence of a false or fraudulent claim. The Court disagrees with this proposition, and qui tam Plaintiff has not submitted any evidence or case law to support such an assertion.

From the voluminous documentation submitted by Plaintiff in this matter, it appears to the Court that qui tam Plaintiff has left no stone unturned in his search for false or fraudulent claims. Despite voluminous filings, and what appears to be an expensive and unfruitful fishing expedition, the Court finds that qui tam Plaintiff has failed to present any evidence which demonstrates that any Defendant knowingly made a false or fraudulent clam to the federal government in

violation of the False Claims Act. Accordingly, since there is no issue of 7 material fact presented regarding knowledge by Defendants of any false claim(s), or of a false claim(s) being filed, Defendants' Motions for Summary Judgment (Doc. Nos. 356 and 367) are **GRANTED**.

Conclusion

Based on the foregoing, qui tam Plaintiff's Motion for a Judge Outside the Orlando Division to Hear this Proceeding (Doc. No. 390) is DENIED. Defendants' Motion for Summary Judgment (Doc. Nos. 356 and 367) are GRANTED. Based on this Order, it is unnecessary for this Court to consider qui tam Plaintiff's six Motions for Partial Summary Judgment or any other motions pending in this case. The Clerk is ordered to enter judgment in favor of of Defendants on all claims and to close this case.

DONE AND ORDERED at Orlando, Florida, this 25th day November 1996. *Patricia C. Fawsett*
UNITED STATES DISTRICT JUDGE

Copies to: All counsel of record **8**

United States District Court

District Of

UNITED STATES OF AMERICA, ex rel **GABE KAIMOWITZ** Esquire, Qui Tam
V.
ORLANDO, FLORIDA, RICK BERNHARDT its planning and development director; and the **ORLANDO NEIGHBORHOOD IMPROVEMENT CORPORATION**....

96 NOV 26AM10:46
CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

Case No. 95-204-CV-ORL-19

☐xx **Decision by Court**. This action came...before the Court and a decision has been rendered. IT IS ORDERED AND ADJUDGED that the Qui Tam Plaintiff, GABE KAIMOWITZ, take nothing, that the action be dismissed on the merits, and that the Defendants, ORLANDO, FLORIDA, RICK BERNHARDT: and the ORLANDO NEIGHBORHOOD IMPROVEMENT CORPORATION, recover the Plaintiff, Gabe Kaimowitz, their costs of action.

November 26, 1996 RICHARD D. SLETTEN, Clerk
Date *By Deputy* Clerk: G. Schafer

UNITED STATES DISTRICT COURT FILED
MIDDLE DISTRICT OF FLORIDA 97 FEB 14AM10:34
ORLANDO DIVISION CLERK, U.S.
DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

UNITED STATES OF AMERICA,
ex rel. GABE KAIMOWITZ, Esquire, Qui Tam,
Plaintiff,

-vs- CASE NO. 95-204-CIV-ORL-19

ORLANDO, FLORIDA; RICK BERNHARDT,
its planning and development director,
and the ORLANDO NEIGHBORHOOD
IMPROVEMENT CORPORATION,
Defendants.

ORDER

This cause came before the Court on the following:

(1) Qui Tam Plaintiff's Motion for Reconsideration of Judgment (Doc. No. 444, filed December 6, 1996), Memorandum of Law in Support of Motion for Reconsideration (Doc. No. 445), filed December 6, 1996), Response of Orlando Neighborhood Improvement Corporation, Inc., to Qui Tam Plaintiff's Motion for Reconsideration of Judgment (Doc. No. 453, filed December 18, 1996), the United States of America's Amicus Curiae Brief Clarifying the Issue of Dismissal Following Summary Judgment in Favor of Defendant (Doc. No.454, filed December 20, 1996), Qui Tam Plaintiff's Motion/Legal Authority to Strike as Erroneous the Amicus Curiae Brief of Stephen J. Gripkey, U.S. Justice Department (Doc. No. 456, filed December 30, 1996), Motion/Legal Authority to Provide Documentary Evidence Primarily Obtained Since a Motion for Reconsideration of a Denial of Summary Judgment by Judge Patricia C. Fawsett (Doc. No. 466, filed January 23, 1997), Qui Tam Plaintiff's Documentary Evidence (Doc. No. 467), Motion/Legal Authority Pursuant to Rule 60(b)(2), F.R.C.P., to Set Aside Judgment on the Basis of Documentary Evidence from the U.S. Economic Development Administration (Doc. No. 470, filed January 29, 1997), Memorandum of Law in Opposition

to Plaintiff's Motion/Legal Authority Pursuant to Rule 60(b)(2), F.R.C.P., to Set Aside Judgment on the Basis of Documentary Evidence from the U.S. Economic Development Administration (Doc. No. 473, filed February 4, 1997), and which appears to be identical to Doc. No. 469).

> On February 5, 1995, Judge Hodges entered an Order in this action, which stated, in part: The United States has filed a notice of election to decline intervention (Doc. 17). The notice also requests, under 31 U.S.C. § 3730, that the Court not dismiss this action without the consent of the United States and that the parties be required to serve all pleadings on the United States. Upon due consideration, these requests are GRANTED and the Plaintiff and Defendants are directed to serve all future pleadings on the United States, and are directed to file in conjunction with any motion seeking the dismissal of this action, a motion for approval by the United States 2 of the proposed dismissal. (Doc. 39, pg. 2).

Qui Tam Plaintiff now asserts that since Defendants did not move for the approval of the United States when they filed their motions for summary judgment, those motions should not have been granted by this Court. Under 31 U.S.C. 3730(b)(1), a civil action may be dismissed only if the Court and the Attorney General give written consent to the dismissal and their reasons for consenting. This section has been interpreted to apply only where a plaintiff seeks voluntary dismissal of a claim or action brought under the False Claims Act, and not where a court orders dismissal. Minotti v. Lensink, 895 F.2d 100, 103 (2d Cir. 1990). The Court finds that it was unnecessary for Defendants to seek consent of the United States to move for summary judgment, and it was unnecessary for this Court to seek the consent of the United States before granting summary judgment in favor of Defendants.

Qui tam Plaintiff also argues that the first twelve volumes of this file were on appeal with the Eleventh Circuit and were thus unavailable for review when the Court considered various motions for summary judgment.

However, this assertion is incorrect. All volumes of the files in this action were returned to this Court so that it had the full record to consider in relation to the summary judgment motions. Upon consideration of these and all other arguments asserted by qui tam Plaintiff, as well as the additional submissions of qui tam Plaintiff, the Court finds there is **3** nothing in the record which would lead this Court to conclude that it had made an error of fact or law or that relief from final judgment is appropriate based upon newly discovered evidence. Accordingly, qui tam Plaintiff's Motion for Reconsideration of Judgment (Doc. No. 444), and Motions Pursuant to Fed. R. Civ. P. to Set Aside Judgment (Doc. Nos. 469 and 473), are DENIED. Qui tam Plaintiff's Motion to Strike the Amicus Curiae Brief of Stephen Gripkey (Doc. No. 456) is DENIED. Qui tam Plaintiff's Motion to Provide Documentary Evidence (Doc. No. 466) is DENIED as MOOT since qui tam Plaintiff has already filed the evidence in question.

(2) Upon consideration, qui tam Plaintiff's Motion/Legal Authority in Support of an Order to Direct Transmission of the November/December 1996 Trial Calendar for the Honorable Patricia C. Fawsett (Doc. No. 468, filed January 29, 1997), is DENIED.

(3) Defendants in this action have moved for attorneys' fees and costs. By this Court's own observation of the record in this case, qui tam Plaintiff has filed an extraordinary amount of pleadings which have often contained irrelevant, redundant, and duplicitous matter in what appeared to be an expensive and unfruitful fishing expedition. The Court now refers Defendant's motions for attorney's fees and costs and all related motions (Doc. Nos. 46, 448, 455, 458, 460 and 465) to the United States Magistrate Judge for a determination of the proper amount of costs and a determination of whether attorney's fees should be granted. **4**

DONE AND ORDERED at Orlando, Florida, this 13th day of February 1997. *Patricia C. Fawsett*

PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE **5**

UNITED STATES DISTRICT COURT FILED
MIDDLE DISTRICT OF FLORIDA 97 MAR26 PM2:39
ORLANDO DIVISION CLERK, U.S.
DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA *Rs*

UNITED STATES OF AMERICA,
ex rel. **GABE KAIMOWITZ**, Esq., Qui Tam,
("Qui Tam") Plaintiffs,
-vs- CASE NO. 95-204-CIV-ORL-19

ORLANDO, FLORIDA; RICK BERNHARDT,
its planning and development director, et al,
Defendants.

ORDER

The parties have filed motions seeking awards of fees and sanctions (Doc. Nos. 446, 458, and 483). Those motions rely on the proper characterization of the now dismissed claims. After the scheduling of a hearing on the motions, a notice of appeal from the final judgment dismissing the claims was filed and is now pending. Determination of that appeal, regardless of its outcome, is likely greatly to affect consideration of these motions. If the judgment is reversed or modified, it is possible that no fee award would be appropriate under any theory, and time spent analyzing the Defendants' fee requests would be wasted.

If the judgment is affirmed by reasoning of the court of appeals will be instructive in deciding the motions. It does not appear that consideration of the appeal itself would be better served if accompanied by a decision on the fees. Thus, there is no countervailing consideration to support immediate determination of the motions for fees. Relator's counter-motion for Rule 11 sanctions is linked to and based on Defendant's motion and should therefore also be deferred.

For these reasons, the motions are DENIED without prejudice to reassertion after completion of the appellate process. See Comments to 1993 Amendments to Rule 58, F.R.Civ.P. The previously scheduled hearing for Monday, April 14, 1997 at 9:00 A.M. is CANCELLED.

Defendants motions to tax costs (Doc. No. 448 and 485) are **DENIED** with leave until March 31, 1997, to tax claimed costs with the Clerk of the Court on the standard form as provided in Rule 54(d)(1), F.R.Civ.P. Review of the taxation of costs may be had as provided in the rule....**2**

DONE and ORDERED in Orlando, Florida on March 26, 1997.

David A. Baker
DAVID A. BAKER
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
Gabe H. Kaimowitz
Karen L. Gable (assistant U.S. Attorney, Orlando)
Michael F. Hertz (attorney, U.S. Department of Justice, DC)
John C. Reber (attorney for Orlando Neighborhood Improvement Corporation)
Scott A. Glass (assistant Orlando City Attorney)
Robert E. Bonner (private attorney, Orlando Defendants)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 97-2777

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
May 7 1998
THOMAS K. KAHN
CLERK

GABE KAIMOWITZ, Esquire,
Qui Tam, Plaintiff-Appellant,
versus
ORLANDO, FL; RICK BERNHARDT,
ORLANDO NEIGHBOR HOOD IMPROVEMENT
CORPORATION ("ONIC"),
Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Florida

BEFORE: BLACK, CARNES and HULL, Circuit Judges

BY THE COURT:

The petition filed by Appellees Orlando, Florida and Rick Bernhardt, to dismiss this appeal is **DENIED**.

Appellees' two pending motions to strike Appellant's brief are **DENIED**.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-2777
Non-Argument Calendar

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
OCT 05 1998
THOMAS K. KAHN
CLERK

GABE KAIMOWITZ, Esquire,
Qui Tam,

Plaintiff-Appellant,

versus
ORLANDO, FL; RICK BERNHARDT,
ORLANDO NEIGHBOR HOOD IMPROVEMENT
CORPORATION ("ONIC"),
Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Florida

(October 5, 1998)

BEFORE: BLACK, TJOFLAT, BIRCH, and MARCUS, Circuit Judges

BY THE COURT:

PER CURIAM:

In this qu tam action brought by appellant pro se for the United States under the False Claims Act, 37 U.S.C. §§3729-3733, the district court entered summary judgment for the defendant, the City of Orlando, its planning and development director Rick Bernhardt, and the Orlando Neighborhood Improvement Corporation. The court gave the defendants summary judgment because appellant had failed to identify any specific claims made by the defendants that were false or fraudulent or that they knew of any false or fraudulent claims that had been made against the government.

Appellant contends that there is sufficient evidence in the record-that the defendants knowingly filed false or fraudulent claims with the United States to preclude the entry of summary judgment. However, he points us to nothing that would permit a reasonable trier of fact to conclude that the defendants filed such claims (Note 1-Appellant raises other issues in his brief. All are frivolous, requiring no comment.)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-2777
Non-Argument Calendar
GABE KAIMOWITZ, Esquire
Qui Tam,
Plaintiff-Appellant,
versus
ORLANDO, FL; RICK BERNHARDT,
ORLANDO NEIGHBOR HOOD IMPROVEMENT
CORPORATION ("ONIC"),
Defendants-Appellees.

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
OCT 05 1998
THOMAS K. KAHN
CLERK

On Appeal from the United States District Court
for the Middle District of Florida

ORDER:

Appellant's motion "[t]o designate the United States as the real party in interest is

Gerald Bard Tjoflat
United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT CORRECTED

No. 97-2777
Non-Argument Calendar
GABE KAIMOWITZ, Esquire
Qui Tam,
Plaintiff-Appellant
versus
ORLANDO, FL; RICK BERNHARDT,
ORLANDO NEIGHBOR HOOD IMPROVEMENT
CORPORATION ("ONIC"),
Defendants-Appellees.

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
OCT 05 1998
THOMAS K. KAHN
CLERK

On Appeal from the United States District Court
for the Middle District of Florida

ORDER:

Appellant's motion "[t]o designate the United States as the real party in interest is **DENIED**."

Gerald Bard Tjoflat
United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-2777
Non-Argument Calendar

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
OCT 05 1998
THOMAS K. KAHN
CLERK

GABE KAIMOWITZ, Esquire,
Qui Tam, Plaintiff-Appellant,

versus

ORLANDO, FL; RICK BERNHARDT,
ORLANDO NEIGHBOR HOOD IMPROVEMENT
CORPORATION ("ONIC"),
Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Florida

BEFORE: TJOFLAT, BIRCH, and MARCUS,
Circuit Judges

J U D G M E N T

This cause came to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

IT is FURTHER ORDERED THAT plaintiff-appellant pay to the defendants-appellees, the costs on appeal to be taxed by the Clerk of Court.

Entered: October 5, 1998
For the Court: Thomas K. Kahn, Clerk

by *Matt Davidson*
Deputy Clerk

ISSUED AS MANDATE: **FEB 16, 1999**

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-2777
Non-Argument Calendar

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FEB 16 1999
THOMAS K. KAHN
CLERK

GABE KAIMOWITZ, Esquire,
Qui Tam, Plaintiff-Appellant,

versus

ORLANDO, FL; RICK BERNHARDT, ORLANDO NEIGHBOR HOOD IMPROVEMENT CORPORATION ("ONIC"),
Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Florida

BEFORE: TJOFLAT, BIRCH, and MARCUS,
Circuit Judges

BY THE COURT:

The two motions for attorney's fees filed by Appellees are GRANTED as to entitlement. This matter is REMANDED to the district court for a hearing to determine the reasonable amount of fees to be awarded to Appellees.

Appellant's "motion to strike request for fees made by an attorney out of time..." is DENIED.

Appellant's motion for sanctions pursuant to 28 U.S.C. §1927 is DENIED.

Appellant's "motion to solicit the view of the U.S. Department of Justice..." is DENIED.

Appellant's first and second "motions to clerk of court or single judge to supplement the record..." are DENIED.

Appellee's motion to strike Appellant's first motion to supplement the record is DENIED AS MOOT.

Appellant's "motion to review order of a single judge denying application to provide supplementary authority" is DENIED.

Appellant's "motion...to stay proceedings on appeal...." is DENIED....

UNITED STATES DISTRICT COURT FILED
MIDDLE DISTRICT OF FLORIDA 99 MAY14 AM9:40
ORLANDO DIVISION CLERK, U.S.
DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

UNITED STATES OF AMERICA,
ex rel. **GABE KAIMOWITZ**, Esq., Qui Tam,
Plaintiff,

-vs- CASE NO. 95-204-CIV-ORL-19

ORLANDO, FLORIDA; RICK BERNHARDT,
its planning and development director, and the
ORLANDO NEIGHBORHOOD IMPROVEMENT CORPORATION,
Defendants.

ORDER
REPORT AND RECOMMENDATION
TO THE UNITED STATES DISTRICT COURT:

This cause came on for consideration without oral argument on the following motions filed herein:

MOTION: DEFENDANTS; MOTION FOR ATTORNEY FEES (Doc. No. 554)
FILED: - March 2, 1999
THEREON it is RECOMMENDED that the motion be GRANTED, as set forth herein

On November 25, 1996, the District Court entered summary judgment in favor of the Defendants and against Plaintiff on this Qui Tam action. Plaintiff appealed. On October 5, 1998, the Eleventh Circuit Court affirmed (Doc. No. 551) and taxed costs on appeal in Defendants' favor. Defendants sought an award of appellate attorney's fees and costs, arguing that the case was "clearly frivolous and vexatious" and thus, Defendants were entitled to their attorney's fees under Title 31 U.S.C. §3730(d)(4). On February 17, 1999, the Eleventh Circuit granted defendants' motions for attorney's fees as to entitlement, and remanded the matter to this Court for a hearing to determine the reasonable amount of fees to be awarded. In the instant motion, Defendants seek in addition an award of attorney's fees incurred "in defense of both pre-appeal and post-appeal actions taken by the Plaintiff's in this matter."

Entitlement to Appellate and Trial Court Fees

The Eleventh Circuit has already found the case to be clearly frivolous and vexations (sic), for purposes of awarding appellate fees. Based upon a review of the record, Defendants are also entitled to attorney's fees incurred in this Court. Despite the constant barrage of allegations and invective that have characterized Plaintiff's filings, the claim itself was found to be wholly without merit.

In its *per curiam* opinion affirming the District Court's summary judgment, the Court of Appeals found that [Plaintiff] "points us to nothing that would permit a reasonable trier of fact to conclude that the defendants filed [false or fraudulent] claims" (Doc. No. 5551 pg. 2.)(Note 1–The affirmance characterized the other issues raised by Plaintiff-Appellant as "frivolous, requiring no comment." In addition to its frivolousness, the tenacious pursuit of this lawsuit in the absence of any evidence, let alone enough to carry the burden of persuasion, can only be deemed vexatious.

> Pursuant to Title 31 U.S.C. § 3730(d)(4):
> If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees **-2-** and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for the purposes of harassment.

The Court finds that such a showing has been made here, and Defendants are entitled to their reasonable attorney's fees and expenses (Note 2–The District Court and the Court of Appeals have already taxed costs against Plaintiff) at both the trial and appellate levels.

(*Note 3–Defendants also assert that they are entitled to an award of attorney's fees pursuant to Rule 11, Fed. R.Civ.Pro. Due to the Court's finding that attorney fees are warranted under the substantive provisions of the False Claims Act, it need not reach the issue of whether attorney's fees should be imposed on Plaintiff as a Rule 11 sanction.*)

Amount

Consistent with the appellate court's instructions on

remand, the Court needs to hold a hearing, including the opportunity to offer evidence (if necessary). Assuming this Report and Recommendation is approved by the presiding District Judge, this hearing should be combined with a hearing on trial court fees. That hearing will be scheduled by notice, after the District Judge's action on this Report and Recommendation. To the extent Plaintiff requests a hearing as to issues pertaining to Defendants' *entitlement* to attorney's fees, the request is DENIED. In determining the amount of reasonable attorney's fees properly awarded, the Court will consider evidence (Note 4–The parties will be given an opportunity to submit affidavits and to refer to previous filings in this Court that are pertinent and in proper form for considering the amount of fees to be awarded.) presented regarding the amount of fees incurred and the reasonableness of the amounts sought, as well as evidence properly presented by Plaintiff regarding his ability to pay. ....(after footnotes 2-4) -3-

MOTION: PLAINTIFF'S MOTION FOR HEARING ON FEES (Doc. No. 557)

FILED: March 15, 1999

THEREON it is **ORDERED** that the motion is **GRANTED** in part and **DENIED** in part as set forth herein.

While the Court will consider Plaintiff's ability to pay in determining a reasonable attorney's fee, the rest of the motion is expressly DENIED. Plaintiff should also be aware that it is not appropriate to rely on unverified and, in some cases, unidentified papers (including the filings made in other courts) to establish facts as to his financial condition for purposes of the pending fee requests.)....-4-

Failure to file written objections to the proposed findings and recommendations contained in this report within ten (10) days from the date of its filing shall bar an aggrieved party from attacking the factual findings on appeal.

Respectfully recommended in Orlando, Florida on May 13, 1999. *David A. Baker*

UNITED STATES MAGISTRATE JUDGE

Copies furnished to: Honorable Patricia C. Fawsett, Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

FILED
99 JUL 9 AM9:36
CLERK, U.S.
DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

UNITED STATES OF AMERICA,
ex rel. **GABE KAIMOWITZ**, Qui Tam,
Plaintiff,

-vs- CASE NO. 95-204-CIV-ORL-19

ORLANDO, FLORIDA, et al.,
Defendants.

ORDER

This cause came before the Court on the following matters: (1) Defendant's Motion for Attorney's Fees and Supporting Memorandum of Law (Doc. No. 554, filed March 2, 1999); Plaintiff's Response to Motion for Attorney's Fees (Doc. No. 555, filed March 15, 1999); the Report and Recommendation of the United States Magistrate Judge (Doc. No. 562, filed May 14, 1999); Plaintiff's Objections to the Report and Recommendation (Doc. No. 563, filed May 26, 1999); (2) Plaintiff's Motion/Memorandum of Law for Rule 11 Sanctions (Doc. No. 556, filed March 15, 1999); Defendant's Response to Plaintiff's Motion for Sanctions (Doc. No. 560, filed March 26, 1999); the Report and Recommendation of the United States Magistrate Judge (Doc. No. 562, filed May 14, 1999).

Upon *de novo* review of the above-noted pleadings, the Court ADOPTS, AFFIRMS, AND APPROVES the Report and Recommendation of the **2** United States Magistrate Judge (Doc. No. 562, filed May 14, 1999). The Clerk is directed to grant and deny the motions as set forth in the Report and Recommendation.

DONE AND ORDERED at Orlando, Florida, this 4th day of July, 1999.

Patricia C. Fawsett
PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

Copies to: All Counsel of Record

UNITED STATES DISTRICT COURT FILED
MIDDLE DISTRICT OF FLORIDA 01 JAN23 PM2:19
ORLANDO DIVISION CLERK, U.S.
DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

UNITED STATES OF AMERICA,
ex rel. **GABE KAIMOWITZ**, Qui Tam, Plaintiff,
-vs- CASE NO.6: 95-204-CIV-ORL-19DAB
ORLANDO, FLORIDA, et al.,
Defendants.

ORDER

This cause came before the Court on the following matters: (1) Defendants Orlando, Florida and Rick Bernhardt's Motion for Hearing to Determine Reasonable Amount of Attorney's Fees and Motion for Entry of Final Judgment of Attorney's Fees (Doc. No. 575, filed April 17, 2000); Qui Tam Plaintiff's Response to the Defendants' Motion (Doc. No. 5999, filed July 12, 2000); (2) Qui Tam Plaintiff's Motion to Disqualify Judge Patricia C. Fawsett (Doc. No. 600, filed July 12, 2000); Defendant's Response to Plaintiff's Motion to Disqualify Judge Patricia C. Fawsett (Doc. No. 606, filed August 3, 2000) (3) Qui Tam Plaintiff's Motions to Set Aside Orders (Doc. Nos 604 and 605, filed July 24, 2000); (4) Qui Tam Plaintiff's Motion for Reconsideration of this Court's Endorsed Order Denying Motion to Set Aside a Magistrate Judge's Order (Doc. No. 616, filed August 25, 2000); (5) Qui Tam Plaintiff's Offer of Facts/Course of Proceedings/Legal Authority to Document Abuses of Discretion by this Court's Magistrate and Judge Sufficient to Warrant Reversal on Appeal of Their Legally Unsupported Award of Fees Without Opportunity for Hearing on the Merits (Doc. No. 625, filed November 3, 2000); (6) The Report and Recommendation of United States Magistrate Judge David A. Baker Recommending that the Defendants' Motion be Granted in Part (Doc. No. 630, filed November 27, 2000); Qui Tam Plaintiff's Objections to Report and Recommendation (Doc. No. 631, filed December 11, 2000); and the Qui Tam Plaintiff's Memorandum of Law in Support of Objections to Report and Recommendation (Doc. No. 632, filed December 11, 2000).

MOTION TO DISQUALIFY

Initially, this Court will consider the Qui Tam Plaintiff's Motions seeking recusal of the Undersigned. During the course of this action, the Qui Tam Plaintiff has unsuccessfully challenged the fairness and impartiality of the Undersigned as well as the Magistrate Judge s and Appellate Justices on numerous occasions. e.g. (Doc. Nos. 51&52(Motion for Recusal of Orlando Judges and Senior Magistrate Judge); (Doc. Nos. 74, 76-77, 81-83, 86 and 89-91)(Motions and Emergency Motions for 2 Reconsideration of Order denying Motion for Disqualification (Doc. No. 242-43)(Renewed Motion for Recusal of the Undersigned); (Doc. No. 390)(Motion for a Judge Outside the Orlando Division to Hearing this Proceeding); (Doc. No. 523)(Eleventh Circuit Court of Appeals' Order denying Plaintiff's Motion top Recuse Chief Judge); (Doc. No. 561 (Eleventh Circuit's Order denying Plaintiff's Motion for Reconsideration of Order denying Motion to Recuse); (Doc. No. 93)(Motion for Recusal of Senior Magistrate); (Doc. No. 497)(Motion for Recusal of Magistrate David A. Baker); see also (Doc. Nos. 30, 31, and 241)(Motion and Renewed Motion for Disqualification of Defendant ONIC's counsel); (Doc. Nos. 173-176 (Motion to Disqualify United States Attorneys); (Doc. No. 220)(Motion to Bar Legal Representation by the Eubanks' Firm). The instant disqualification Motion is similarly without merit.

The Qui Tam Plaintiff contends that the Undersigned "and her magistrates" should be disqualified from considering this action due to "their heretofore undisclosed *ex parte* communications with counsel for Defendants in 1996." See (Doc. No. 600, at 1). According to the Qui Tam Plaintiff, the Undersigned "and the magistrate gained personal knowledge of disputed evidentiary facts concerning the proceeding" requiring disqualification pursuant to Title 28, United States Code 3 section 455(b)(1)(*Note 1–Section 455(b)(1) provides as follows: "(b)(Any justice, judge or magistrate of the United States) shall also disqualify himself in the following circumstances: (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding...." 28 U.S.C. § 455 (b) (1).*) Id. at 2.

The Qui Tam Plaintiff points to the Defendants' billing records submitted in support of their Motions for Attorney's Fees as the sole support for his contention that the Undersigned and a Magistrate Judge "gained personal knowledge of disputed evidentiary facts." The billing records indicate that Defendants billed their clients for five telephone calls by "JF" to the chambers of the Undersigned and the Magistrate Judge.

The billing records provide:

> 05/17/96 *JF *TELECON WITH JUDGE FAWSETTS [sic] CHAMBERS TO INQUIRE ABOUT JURY TRIAL DOCKET 0.10
> 05/20/96 *JF *TELECON WITH MICHELLE FROM JUDGE FAWSETT'S OFFICE TO VERIFY JULY TRIAL DOCKET 0.10
> 05/21/96 *JF *TELECON? WITH MICHELLE FROM JUDGE FAWSETTS' [sic] OFFICE TO FOLLOW UP ON SCHEDULING ORDER 0.10
> 06/19/96 *JF *TELECON WITH MICHELLE FROM JUDGE FAWCET'S {sic} CHAMBERS TO CLARIFY SCHEDULING ORDER PROCESS 0.20
> 06/19/96 *JF *TELECON WITH MAGISTRATE BAKERS [sic] TO FOLLOW UP ON REPORT
> AND RECOMMENDATION 0.20
> (Doc. 610, Exh. 4).
> (After footnote 1 above) **4**

The foregoing indicates only that Defendants' counsel had someone contact the Undersigned's judicial assistant regarding purely ministerial matters. The foregoing does not create even an "appearance of impropriety" let alone establish that the Undersigned or Magistrate Judge "gained personal knowledge of disputed evidentiary facts." See 28 U.S.C. § 455(a) ("Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned"); Aiken County v. BSP Div. of Envirotech Corp., 866 F. 2d 661, 678-79 (4th Cir. 1989)(holding that the following *ex parte* contacts did not require disqualification under section 455(a): (1) counsel's *ex parte* communication "with the

judge concerning a scheduling conflict"; (2) the judge's request through his law clerk for a memorandum of law from one party regarding a technical matter of law; and (3) the judge's receipt through his law clerk, of a memorandum of law regarding another technical matter; see also Levitt v. University of Texas, 847 F.2d 221, (sic) 5th Cir. 1988) (denying motion to disqualify based upon the plaintiff's conclusory allegations that the judge "received *ex parte* communications about the case either through his wife or from Dr. Sawyer"); Hunt v. American Bank & Trust Co. of Baton Rouge, La., 783 F.2d 1011,1015-16 (11th Cir. 1986)(finding that section 455(a) standard not met where disqualified law clerks did not work on the case "or even 5 talked with the judge about it to any significant extent.")

ATTORNEY'S FEES

With regard to attorney's fees, the only issue before the Court at this time is the amount that should be awarded to the Defendants the City of Orlando (the "City") and Rick Bernhardt ("Bernhardt"). The Eleventh Circuit Court of Appeals has already ruled that the City and Bernhardt are entitled to attorney fees incurred in pursuing the appeal. See (Doc. No. 561)(remanding the action to this Court for a hearing to determine the reasonable amount of fees to be awarded to the Appellees); see also Piambino v. Bailey, 757 F.2d 1112, 1119 (11th Cir. 1985)("A trial court upon receiving the mandate of an appellate court, may not alter, amend, or examine the mandate, or give any further relief or review, but must enter an order in strict compliance with the mandate"). Similarly, on July 8, 1999, this Court ruled that the City and Bernhardt are entitled to the attorney fees incurred prior to the Plaintiff's appeal to the Eleventh Circuit. See (Doc. No. 567); see also (Doc. No. 562). Thus, the issue of entitlement will not be revisited at this time.

Based on the parties' written submissions and the evidentiary hearing on the matter, the Magistrate Judge issued a Report and Recommendation ("Report") recommending that the City and Bernhardt be awarded $20,000.00 for attorney fees. 6 See (Doc. No. 630).

The amount recommended by the Magistrate Judge in his Report and Recommendation reflects the Qui Tam

Plaintiff's ability to pay and is significantly less than the amount requested by the City and Bernhardt. (*Note 2-The Qui Tam Plaintiff specifically requested that his ability to pay be taken into consideration in determining the amount of attorney's fees awarded. See (Doc. No. 558).*) See (Doc. No. 575). Nonetheless, the Defendants did not file an objection to the Report and Recommendation. See (Doc. No. 630, at 8) that the "[f]ailure to file written objections to the proposed findings and recommendations contained in the report with ten (10) days...shall bar an aggrieved party from attacking the factual findings on appeal"). The Qui Tam Plaintiff, however, did file timely objections to the Report and Recommendation on December 11, 2000. See (Doc. Nos. 631 & 632). Consequently the Court will review the portions of the Report to which the Relator objected *de novo*. See 28 U.S.C. § 636(b)(1); Fed R. Civ. P. 71. In this regard, the Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made" in the Report. See id.

Upon review of the record, the Court finds that the Report and Recommendation correctly states the facts and law applicable to the Defendants' Motion for Entry of Final Judgment of Attorneys Fees. Primarily, the Qui Tam Plaintiff's objections concentrate 7 on whether the City and Bernhardt are entitled to fees under the relevant provision of the False Claims Act. (*Note 3 The relevant provision provides for a successful defendant's recovery of its attorney fees as follows: (4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment. 31 U.S.C. § 3730 (d) (4).*) See (Doc. No. 632, at 2-11). As noted above, the issue of entitlement to attorney fees has been resolved and will not be revisited.

With regard to the amount of the attorney fees awarded, the Qui Tam Plaintiff argues that the Magistrate Judge reached the amount awarded through improper means. See (Doc. No. 632, at 11-15). As noted above, the issue of

entitlement to attorney fees has been resolved and will not be revisited. With regard to the amount of the attorney fees awarded, the Qui Tam Plaintiff argues that the Magistrate Judge should have made a line by line analysis of the fees submitted. Presumably, after doing so, the Magistrate Judge could then reduce the amount awarded to $20,000. (*Note 4– Based upon the Court's familiarity with the instant action, the Court is confident that no attorney in this market could have expended less than $20,000 in billable hours to represent the City and Bernhardt in this case. For instance, if one were to assume an extremely modest hourly rate of $100 per hour, the $20,000 amount awarded in this case would amount to only 200 hours expended. An extremely efficient attorney would expand more than 200 hours working on the appeal of this matter alone, especially when one considers the numerous motions filed* **8** *by the Relator before the appellate court. In light of the foregoing, the Court finds that it would have been an extraordinary waste of judicial resources for the Magistrate Judge to have engaged in the type of analysis demanded by the Relator.*) The cases **8** relied upon by Relator do not stand for this position; (*Note 5–In this regard, the Court notes that none of the cases cited by the Relator involved a consideration of the party's ability to pay. See, e.g.* Loranger v. Stierheim, *10 F.3d 776 (11th Cir. 1994);* Wilkes v. Polk County, Ga., *952 F. Supp. 808 (M.D. Ga. 1997*).) furthermore, the Court finds that the Magistrate Judge's reliance upon Loranger v. Stierheim, 10 F.3d 776 (11th Cir. 1994) was proper. See (Doc No. 632, at 12-13)(arguing that the Magistrate Judge's reliance on Loranger was in error.)

CONCLUSION

Based upon the foregoing, the Court rules that: (1) The Qui Tam Plaintiff's Motion to Disqualify Judge Patricia C. Fawsett (Doc. No. 600) is **DENIED**. (2) The Qui Tam Plaintiff's Motion to Set Aside Orders (Doc. Nos. 604 and 605) are **DENIED**. (3) The Qui Tam Plaintiff's Motion for Reconsideration of this Court's Endorsed Order Denying Motion to Set Aside a Magistrate Judge's Order (Doc. No. 616) is **DENIED.** (4) The Qui Tam Plaintiff's Offer of Facts/ Course of Proceedings/Legal Authority to Document Abuses of Discretion by this Court's Magistrate and Judge

Sufficient to Warrant Reversal on Appeal of Their Legally Unsupported Award of Fees Without **9** (*after footnote 5*), Opportunity for Hearing on the Merits (Doc. No. 625) is **DENIED**. (5) The Report and Recommendation of United States Magistrate Judge David A. Baker Recommending that the Defendants' Motion for Entry of Final Judgment of Attorney Fees (Doc. No. 575) be Granted in Part (Doc. No. 630) is **ADOPTED, AFFIRMED, AND APPROVED**. (6) Defendants Orlando, Florida and Rick Bernhardt's Motion for Entry of Final Judgment of Attorney's Fees (Doc. No. 575) is **GRANTED**. The Clerk is ordered to enter judgment in the amount of $20,000.00 in favor of Defendants Orlando, Florida and Rick Bernhardt and against the Qui Tam Plaintiff Gabe Kaimowitz. **DONE AND ORDERED** at Orlando, FL, this *23rd* day of January, 2001. *Patricia C. Fawsett,*

PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

Copies to: All Counsel of Record **10**

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
Case No. 6:95-cv-204-Orl-19DAB

UNITED STATES OF AMERICA, ex rel
GABE KAIMOWITZ Esquire, Qui Tam, Plaintiff,
V. ORLANDO, FLORIDA, RICK BERNHARDT,
its planning and development director; and the
ORLANDO NEIGHBORHOOD IMPROVEMENT CORPORATION, Defendants.

JUDGMENT IN A CIVIL CASE

Decision by the Court: The action came before the Court, the Honorable Patricia C. Fawsett presiding. The issues having been heard and a decision having been rendered.
IT IS ORDERED AND ADJUDGED Defendant's Orlando, Florida and Rick Bernhardt's Motion for Entry of Final Judgment of Attorney's Fees (doc. 575) is GRANTED. Judgment is entered in the amount of $20,000 in FAVOR of Defendants Orlando, Florida and Rick Bernhardt and AGAINST the Qui Tam Plaintiff Gabe Kaimowitz.
Date: January 25, 2001 SHERYL L. LOESCH, CLERK
By H?Lane, Deputy Clerk

UNITED STATES DISTRICT COURT FILED
MIDDLE DISTRICT OF FLORIDA 01 FEB8 PM2:55
ORLANDO DIVISION CLERK, U.S.
DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

UNITED STATES OF AMERICA,
ex rel. **GABE KAIMOWITZ**, Qui Tam,
Plaintiff,

-vs- CASE NO.6: 95-204-CIV-ORL-19DAB

ORLANDO, FLORIDA, RICK BERNHARDT,
its planning and development director; and the
ORLANDO NEIGHBORHOOD IMPROVEMENT CORPORATION,
Defendants.

ORDER

IT IS HEREBY ORDERED that the above-styled action is referred to United States Magistrate Judge David A. Baker for report and recommendation to the Court as to Defendant Orlando Neighborhood Improvement Corporation, Inc., Motion for Entry of Final Judgment of Attorney Fees (Doc. No. 618, filed August 30, 2000).

DONE AND ORDERED in Chambers at Orlando, Florida, this 7th day of February, 2001.

Patricia C. Fawsett,
PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of Record

UNITED STATES DISTRICT COURT FILED
MIDDLE DISTRICT OF FLORIDA 01 FEB15 AM8:47
ORLANDO DIVISION CLERK, U.S.
DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

UNITED STATES OF AMERICA,
ex rel. **GABE KAIMOWITZ, ESQ., Qui Tam,** Plaintiff,
-vs- CASE NO.6: 95-204-CIV-ORL-19DAB
ORLANDO, FLORIDA, RICK BERNHARDT,
its planning and development director; and the
ORLANDO NEIGHBORHOOD IMPROVEMENT CORPORATION, Defendants.

REPORT AND RECOMMENDATION
TO THE UNITED STATES DISTRICT COURT

This cause came on for consideration without oral argument on the following motion filed herein:

MOTION: DEFENDANTS' ORLANDO NEIGHBORHOOD IMPROVEMENT CORPORATION, INC., MOTION FOR HEARING TO DETERMINE REASONABLE AMOUNT OF ATTORNEY'S FEES AND MOTION FOR ENTRY OF FINAL JUDGMENT OF ATTORNEY FEES
(Doc. No. 618) FILED: August 30, 2000

THEREON it is recommended that the motion be DENIED, as untimely.

On October 15,. 1996, Defendant Orlando Neighborhood Improvement Corporation, Inc., (herein "ONIC") filed a motion for summary judgment (Doc. No. 367). On November 26, 1996, the District Court granted the motion (Doc. No. 442) and judgment was entered, with costs awarded to Defendants (Doc. No. 443). On December 10, 1996, co-defendants filed a motion for attorney's fees (Doc. No. 446), but ONIC did not file a motion for attorney's fees until March 4, 1997 (Doc. No. 483). The Court denied both motions without prejudice to reassertion after the appellate process was completed (Doc. No. 503).

The Court of Appeals affirmed the district court's judgment on February 18, 1999 (Doc. No. 551) and granted Defendants-Appellees' motions for appellate fees and costs

as to entitlement, remanding the matter to the district court for a hearing to determine the reasonable amount of fees (Doc. No. 561). Defendants Orlando and Bernhardt promptly filed their Motion for Attorney's Fees (Doc. No. 554 filed March 2, 1999). ONIC did not file a similar motion or paper until almost a year and a half later (Doc. No. 618).

This Court issued a Report and Recommendation on May 14, 1999, recommending that Defendants Orlando and Bernhardt's motion be granted, and that a hearing be held, on notice, after the District Court's action on the report (Doc. No. 562). The undersigned noted that the parties "will be given an opportunity to submit affidavits and to refer to previous filings in this Court that are pertinent and in proper form for considering the amount of fees to be awarded." On July 8, 1999, the District Court adopted and approved the undersigned's recommendations (Doc. No. 567).

On April 17, 2000, the matter next came before the Court upon Defendants Orlando and Bernhardt's motion for a hearing to determine the reasonable amount of fees and for entry of final judgment thereon (Doc. Nol. 575). No similar request was filed by ONIC at that time either. On May 2, 2000, the Court granted the request for a hearing, and set the matter for August 24, 2000, giving Plaintiff until July 21, 2000 to file a response to Orlando and Bernhardt's motion (Doc. No. 580). -2-Numerous affidavits and other papers were filed by Orlando, Bernhardt and Plaintiff in July. Nothing was presented by ONIC during this time of obvious preparation. On July 7, 2000, the Court reset the evidentiary hearing until September 1, 2000 (Doc. No. 598). Additional affidavits and other papers were filed in early and mid-August by the other parties but nothing was submitted by ONIC. On August 30, 2000, the day before the hearing on co-defendants' motion, ONIC finally filed its motion for hearing and to determine reasonable attorney's fees. At the hearing, Plaintiff objected to the untimeliness of ONIC's motion. (*Note 1–Plaintiff has maintained his objection to ONIC's motion on this and numerous other grounds.*) The Court noted that the motion was not yet ripe, as it was just filed. The hearing proceeded that day (and as continued)

only as to Orlando and Bernhardt's scheduled motion.

The Court, taking into account Plaintiff's limited ability to pay, issued a report and recommendation on Orlando and Bernhardt's motion (Doc. No. 630); the District Court adopted the report (Doc. No. 635) and judgment was entered (Doc. No. 636). The instant motion has not been referred to the undersigned for disposition.

The Court finds that ONIC has waived any and all claims for attorney's fees, due to its failure to timely seek such an award from the Court. As the above chronology illustrates, ONIC failed to timely seek an award of fees after the initial judgment was entered, and did not seek a hearing on the appellate fees until almost a year and a half after the issuance of the mandate. Those unexcused delays occurred despite the fact that co-defendants were actively pursuing their request and copying counsel on the various affidavits and supporting papers filed. Moreover, ONIC knew of the hearing scheduled 3 on co-defendants' motion, but despite months of notice, did not file its motion until one day before the hearing. In addition to being untimely, the motion is prejudicial to Plaintiff, co-defendants, and the Court. It was in the best interests of all concerned that all claims be heard in one proceeding, especially considering that the award in the end was limited by Plaintiffs' financial inability to pay. Co-defendants have already received a judgment, which did not consider Plaintiff's liability (if any) for fees owed to ONIC. To the extent additional fees might be owed, the Court determined that Plaintiff's reasonable ability to pay is only $20,000, and judgment in that amount has already been entered in favor of others. It is recommended that the Court deny the motion in its entirety as untimely. Failure to file written objections to the proposed findings and recommendations contained in this report within ten (10) days from the date of its filing shall bar an aggrieved party from attacking the factual findings on appeal. Respectfully recommended in Orlando, Florida, this *14th* day of February 2001.

David A. Baker
UNITED STATES MAGISTRATE JUDGE

Copies furnished to: Honorable Patricia C. Fawsett
Counsel of Record

To: Gabe Kaimowitz From: Amy Iennaco 352-338-3205
Re: Your Public Records Act Request Date: 3-15-01
I received these from Mr. Munsey this morning. The files had to be retried from storage. I apologize for the delay.

(CITY OF ORLANDO SEAL) MEMORANDUM
To: David Brandt, Risk Manager
From: Mark Munsey, Property and Casualty Examiner
Date: February 7, 1995 Subject: Orlando Neighborhood Improvement Corp. ("ONIC") File # 1394120026
....I recommend that we do not provide a courtesy defense to ONIC because attorney John Reber has entered an appearance as counsel of record for ONIC, he has answered the Complaint, and has also filed a motion with respect to transfer of venue. Additionally, the general theme of the lawsuit is that ONIC is not really a free standing enterprise but rather a shell set-up by the City of Orlando for the purpose of obtaining federal funding and I believe that if we provide a courtesy defense to ONIC, that it would only serve to lend some credence to the Plaintiff's allegation. Therefore, I recommend that we maintain a closely coordinated relationship between our respective defense attorneys, but that we not provide a courtesy defense....

(City Seal) City of Orlando
Risk Management City Hall Telephone (407) 246-2255
One City Commons, 400 South Orange Avenue, 2nd Floor
Orlando, Florida 32801-3302

February 14, 1995--Mr. Robert E. Bonner, Esquire, P.O. Box 4973, Orlando, FL 321802 Re: United States v. ONIC, Your File #94-1431 Dear Bob: As of today, it is the position of the City of Orlando that it will not be affording a "courtesy defense" to ONIC in connection with this matter. I realize that this is a contradiction to some earlier communications you may have received and I regret any inconvenience this may have caused you. However, I ask that you maintain a close working relationship with Attorney John Reber in light of his entered an Appearance as Counsel of Record for ONIC and that you afford him great cooperation. If you have any questions, please call me at 246-2255. Sincerely, *M.. Munsey,*
Mark Munsey...Orlando, Property and Casualty Examiner

UNITED STATES DISTRICT COURT FILED
MIDDLE DISTRICT OF FLORIDA 01 APR9 AM8:55
ORLANDO DIVISION CLERK, U.S.
DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

UNITED STATES OF AMERICA,
ex rel. **GABE KAIMOWITZ**, Qui Tam, Plaintiffs,
v. **CASE NO.6: 95-204-CIV-ORL-19B**
ORLANDO, FLORIDA, et al., Defendants.

ORDER

This cause came before the Court on the Qui Tam Plaintiff's Motion/Legal Authority for Sanctions Against John Reber, Esq., including Award of Fees (Doc. No. 645, filed March 19, 2001); and Appendix of Exhibits (Doc. No. 646, filed March 19, 2001). The Quit (sic) Tam Plaintiff in this action seeks sanctions against attorney John Reber pursuant to Rule 11 of the Federal Rules of Civil Procedure. See (Doc. No. 645). "A party seeking sanctions should give notice to the court and the offending party promptly upon discovering a basis for doing so." See Fed. R. Civ. P. 11 (advisory committee notes). Here, the motion which the Plaintiff contends warrants the imposition of sanctions was filed on August 30. 2000. See (Doc. No. 618). The Plaintiff did not provide notice to Mr. Reber or file the instant motion until six months after the motion was filed. See (Doc. No. 645). At least one basis the Plaintiff asserts warrants sanctions, untimeliness (*Note 1–In addition the Plaintiff reasserts his previously rejected arguments that the undersigned and the Eleventh Circuit Court of Appeals is somehow biased in this case. See (Doc. No. 645). The Court will not address these arguments again.*) was apparent from the face of the relevant motion. See (Doc. No. 618). Thus Plaintiff's motion is untimely. Because the Plaintiff delayed in seeking sanctions and has not persuaded the Court that sanctions are warranted, the Plaintiff's motion will be denied. The Court rules that the Qui Tam Plaintiffs' Motion/Legal Authority for Sanctions Against John Reber, Esq., Including Award of Fees (Doc. No. 645) is **DENIED**.

DONE AND ORDERED at Orlando, Florida this 9th day of April 2001 .

Patricia C. Fawsett
PATRICIA C. FAWSETT,
UNITED STATES DISTRICT JUDGE

Copies to: All Counsel of Record **2**

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

FILED
01 APR9 AM8:55
CLERK, U.S.
DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

UNITED STATES OF AMERICA,
ex rel. **GABE KAIMOWITZ**, Qui Tam,
Plaintiffs,

v. CASE NO.6: 95-204-CIV-ORL-19B
ORLANDO, FLORIDA, et al.,
Defendants.

ORDER

This cause came before the Court on the following matters:

(1) Defendant Orlando Neighborhood's Motions for Hearing to Determine Amount of Attorney's Fees and for Entry of Final Judgment on Attorney's Fees (Doc. No. 618, filed August 30, 2000); the Quit (sic) Tam Plaintiff's Response to Hearing Request for Orlando Neighborhood (sic) (Doc. No. 622, filed September 11, 2000); (2) The Report and Recommendation filed February 15, 2001 (Doc. No. 643, filed February 27, 2001).

Upon *de novo* review of the above-noted pleadings, the Court **ADOPTS, AFFIRMS, and APPROVES** the Report and Recommendation of the United States Magistrate Judge (Doc. No. 640). Defendant Orlando Neighborhood's Motions for Hearing to Determine Amount of Attorney's Fees and for Entry of Final Judgment on Attorney's Fees (Doc. No. 618) is **DENIED**. **DONE AND ORDERED** at Orlando, Florida this 9th day of April, 2001.

Copies to:
All Counsel of Record

Patricia C. Fawsett
PATRICIA C. FAWSETT,
UNITED STATES DISTRICT JUDGE **-2-**

UNITED STATES DISTRICT COURT FILED
MIDDLE DISTRICT OF FLORIDA 01 JUNE-8 AM11:49
ORLANDO DIVISION CLERK, U.S.
DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

UNITED STATES OF AMERICA,
ex rel. **GABE KAIMOWITZ**, Qui Tam,
Plaintiffs,

v. CASE NO.6: 95-204-CIV-ORL-19B
ORLANDO, FLORIDA, et al.,
Defendants.

ORDER

This cause came before the Court on the Qui Tam Plaintiff's Motion to Alter or Amend Order, Dkt. #650 Pursuant to Rule(s) 59 and 60, Federal Rules of Civil Procedure (Doc. No. 651, filed April 17, 2001), and Defendants, Orlando, Fla., and Rick Bernhardt's Response to Plaintiff's Motion to Alter or Amend Order (Doc. No. 654, filed May 4, 2001). In an Order dated April 9, 2001, this Court denied Defendant Orlando Neighborhood's (sic) Motions for Hearing to Determine Amount of Attorney's Fees and for Entry of Final Judgment on Attorney's Fees. See (Doc. No. 650). Although this ruling would seem to benefit Mr. Kaimowitz, he has nonetheless sought reconsideration of the Order pursuant to Rules 59 and 60 of the Federal Rules of Civil Procedure. (*Note 1–Rule 59(ee) states that "[a]ny motion to alter or amend a judgment shall be filed no later than 10 days after entry of the 2 judgment." Fed. R. Civ. P. 59(e).*)

It appears that Mr. Kaimowitz objects to the April 9 Order because it failed to conclude that John C. Reber, Esq. ("Reber"), and Robert Bonner, Esq. ("Bonner") had violated Rule 11(b)(1) of the Federal Rules of Civil Procedure. See id. at 5. According to Mr. Kaimowitz "an unbiased judge would appear to be required to impose sanctions on her own motion" in light of the finding that attorney Reber's application for sanctions was untimely and "prejudicial to Plaintiff, co-defendants and the Court." Id..

Mr. Kaimowitz further argues that "[n]ew evidence" provided to him together with the transcript of a hearing held on September 1, 2000 "would persuade an unbiased jurist" that Reber and Bonner "colluded to frustrate the meaningful adjudication in this Court from the winter of 1995 until" the date of the hearing. (*Note 2–The Court notes that the bulk of the "new evidence" identified by Mr. Kaimowitz is not new. See Fed. R. Civ. P. 60(b). Mr. Kaimowitz has submitted records for the City of Orlando that are dated from June 14, 1990 through the present. See (Doc.. No. 656). Only a handful of the documents are even dated after August of 2000. See id., at A, I-1 to I-3, R-1 to R-2, U-1 to U-3. W-1 to W-3, and X-3*). Id., at 1.

Contrary to Mr. Kaimowitz's intimation to the contrary, it is entirely within the discretion of this Court to impose sanctions under Rule 11 of the Federal Rules of Civil Procedure. Rule 11(c)(1)(B) provides that "[o}n its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto." Fed. R. Civ. P. 11(c)(1)(B). (emphasis added). Here, Mr. Kaimowitz has not persuaded the Court to amend its April 9 Order to require Mr. Reber and Mr. Bonner to "show cause" that they have not violated Rule 11(b)(1). Thus, the Qui Tam Plaintiff's Motion to Alter or Amend Order, #650 Pursuant to Rule(s) 59 and 60, Federal Rules of Civil Procedure (Doc. No. 651) is DENIED.

DONE AND ORDERED at Orlando, Florida, this 8th day of June 2001.

Patricia C. Fawsett
PATRICIA C. FAWSETT,
UNITED STATES DISTRICT JUDGE

Copies to: All Counsel of Record 3

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

FILED
2001 DEC 26 AM 10:31
U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

SEALED

ATTORNEYS AGAINST AMERICAN APARTHEID, by Gabe Kaimowitz, qui tam, pro se,
Plaintiff

-vs- **Case No. 6:01-cv-705-ORL-18DAB**

ORLANDO, FLORIDA, by and through its Mayor, Glenda Hood
Defendant.

ORDER

Counsel for Plaintiff, Attorneys Against American Apartheid, (*Note 1–In this court's earlier order, the plaintiff was referred to as "Attorneys Against." This was an inadvertent error due to improper computer formatting and appeared automatically when the case style was called up on the computer screen.*) has filed a Motion for Recusal of the undersigned judge, pursuant to 28 U.S.C. § 144 (Doc. No. 49, filed November 19, 2001), along with a Memorandum of Law in Support of Recusal (Doc. No. 50, filed November 19, 2001), and an Affidavit in Support of Motion for Recusal (Doc. No. 51, filed November 19, 2001). In resolving the question of judicial recusal, this court is required to assume the allegation contained in the motion and affidavit as true and to base its decision on the legal sufficiency of the affidavit. See Phillips v. Joint Legislative Com., Etc., 637 F.2d 1014, 1019 (5th Cir. 1981)("If an affidavit filed under section 144 is timely and technically correct, its factual allegations must be taken as true for purposes of recusal. The judge must pass on the legal sufficiency of the affidavit, but he may not pass on the truth of the matters alleged.")

Upon consideration, the court finds that much of the affidavit contains conclusions and speculation about unfavorable rulings, none of which by themselves constitute the requisite legal sufficiency. See United States v. Greenough, 782 F.2d 1556. 1559 (11th Cir. 1986)(in the context of a 28 U.S.C. § 445(a) motion for recusal, holding

that a judge should not recuse himself on unsupported, irrational, or highly tenuous speculation); United States v. v. Meester, 762 F.2d 867, 885 (11th Cir. 1985)(holding that a motion for disqualification may not ordinarily be based on the judge's rulings in the same case). The plaintiff further alleges that the undersigned owns or owned mutual funds managed by TD Waterhouse, (*Note 2–T.D. Waterhouse was not included in the interested parties lists submitted by the parties.*) which the affidavit alleges has a contractual relationship with the Defendant, City of Orlando. This is also not an allegation which requires disqualification of the court.

However, the court finds that recusal is warranted based on Plaintiff's allegation that Defendant, Glenda Hood, has publicly supported the judges of the Orlando Division in their views pertaining to the construction of a new federal courthouse. A reasonable person might infer from such allegations that the court has a relationship with the City of Orlando or Mayor Hood which would compromise the court's objectivity and fairness. Taking this allegation as true, which the court must do, this court concludes that the affidavit is legally sufficient. (*after footnote 2*)-**2**-

Accordingly, Plaintiff's Motion for Recusal (Doc. No. 49) is **GRANTED**. The Clerk is directed to reassign this case. DONE and ORDERED in Chambers, Orlando, Florida, this *26* day of December, 2001.

John A----------
JOHN ANTOON II
United States District Judge

Copies furnished to:
Counsel of Record
Unrepresented Party

-3-

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
FEB 13 2002
THOMAS K. KAHN,
CLERK

No. 01-11514-II

GABE KAIMOWITZ, Esquire,
Qui Tam, Plaintiff-Appellant,
versus
ORLANDO, FL, RICK BERNHARDT,
Defendants-Appellees.

No. 01-13857-II
GABE KAIMOWITZ, Esquire, Qui Tam,
UNITED STATES ex rel, Plaintiffs-Appellants,
versus
JOHN REBER, Interested Party-Appellee.

No.01-13858-II,
GABE KAIMOWITZ, Esquire, Qui Tam,
UNITED STATES ex rel, Plaintiffs-Appellants,
versus
ORLANDO NEIGHBORHOOD IMPROVEMENT
CORPORATION ("ONIC"), Defendant-Appellee.

On Appeal from the United States District Court
for the Middle District of Florida

ORDER:

Appellant's motion to consolidate these appeals is DENIED IN PART as to 01-11514 and GRANTED IN PART as to 01-13857 and 01-13858.

Appellant's consolidated brief in 01-13857 and 01-13858 is due within forty (40) days of the date of this Order.

/s/ Gerald Bard Tjoflat
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
FEB 14 2002
THOMAS K. KAHN,
CLERK

No. 01-11514-II

Non-Argument Calendar

D.C. Docket No. 95-00104-CV-ORL-19

GABE KAIMOWITZ, Esquire, Qui Tam,
Plaintiff-Appellant,
USA ex rel, Plaintiff,
versus
ORLANDO, FL, RICK BERNHARDT,
Defendants-Appellees.
ORLANDO NEIGHBORHOOD IMPROVEMENT CORPORATION ("ONIC"),
Defendant

Appeal from the United States District Court
for the Middle District of Florida

February 14, 2002

Before TJOFLAT, CARNES, and HULL, Circuit Judges.
PER CURIAM:

Gabe Kaimowitz appeals an award of $20,000 in attorneys' fees to the City of Orlando, Florida (Orlando), and Rick Bernhardt, the planning and development director, pursuant to the Fair Claims Act (FCA), 31 U.S.C. §3730, and the denial of his motion to recuse the district court judge, 28 U.S.C. §455. He contends that this Court's grant of attorneys' fees did not result in a finding that his underlying claim was frivolous and that the district court erred in awarding attorneys' fees for time not spent on the appeal from which the order of attorneys' fees was issued. Kaimowitz also argues that he was prejudiced by the district court judge's ex parte communications with counsel for Bernhardt and Orlando, thus the district court erred in denying his motion to recuse the district court judge.

The district court thoroughly addressed these issues in its order of January 23, 2001, the order now appealed. We find no fault in the district court's analysis of the issues or in its application of the law to the factual scenario before it. AFFIRMED **2**

UNITED STATES DISTRICT COURT FILED
MIDDLE DISTRICT OF FLORIDA 02 JAN 10
ORLANDO DIVISION AM 10:52
IN CAMERA AND CLERK, U.S. DISTRICT COURT
UNDER SEAL MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

ATTORNEYS AGAINST AMERICAN APARTHEID, by Gabe Kaimowitz, qui tam, pro se,
Plaintiff

vs CASE NO.. 6:01-CV-705-ORL-19DAB

ORLANDO, FLORIDA, by and through its May (sic) Glenda Hood Defendant.

ORDER OF REFERRAL

This cause is before the Court on the Order (Dkt. 56) referring this matter to the undersigned for assignment and resolution. Plaintiff has requested the recusal of the Honorable Patricia C. Fawsett, United States District Judge (Dkts. 54, 55). The Motion to Recuse is assigned to the Honorable Susan C. Bucklew, United States District Judge, for resolution. DONE and ORDERED in Chambers, in Tampa, Florida on this 10th day of January 2002.

Elizabeth A. Kovachevich
ELIZABETH A. KOVACHEVICH
United States District Judge

Copies to: All parties and counsel of record Judge Bucklew

UNITED STATES DISTRICT COURT FILED
MIDDLE DISTRICT OF FLORIDA 02 FEB 15 PM 4:19
ORLANDO DIVISION CLERK,U.S. DISTRICTCOURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

UNITED STATES OF AMERICA, et al.,
Plaintiffs

vs. **CASE NO. 6:01-CV-705-ORL-19DAB**
IN CAMERA AND UNDER SEAL

CITY OF ORLANDO, FL, et al Defendants.

ORDER

This cause is before the Court *sua sponte*. The Court previously referred the Motion to Recuse (Dkts. 54, 55). There is authority to support such a request. See United States v. Craig, 853 F. Supp. 1413 (S.D. Fla. 1994).

However, it is not the usual practice in this district. After consideration of the circumstances of this case, the Court reconsiders its decision to accept the Motion to Recuse on referral, and vacates the Order referring the Motion to Recuse to Judge Bucklew. Accordingly, it is **ORDERED** that the Order Referring the Motion to Recuse to Judge Bucklew is **vacated,** and the request for referral of the Motion to Recuse (Dkt. 56) is **denied.** Judge Fawsett shall rule on Plaintiff's Motion to Recuse. The Motion to Disqualify Chief Judge is **denied as moot**, and the Motion for Modification is *Case No. 6:01-CV-705-ORL-19DAB* **denied as moot. DONE and ORDERED** in Chambers on this *13th* day of February 2002. *Elizabeth A. Kovachevich*

ELIZABETH A. KOVACHEVICH
United States District Judge

Copies to: All parties and counsel of record

UNITED STATES DISTRICT COURT FILED
MIDDLE DISTRICT OF FLORIDA 02 MAR-7 PM 5:20
ORLANDO DIVISION CLERK, U.S. DISTRICT COURT
UNDER SEAL MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

UNITED STATES OF AMERICA, ex rel., etc., Plaintiff,

vs. **CASE NO. 6:01-CV-705-ORL-19DAB**

CITY OF ORLANDO, FL, et al Defendant.

ORDER

This cause is before the Court on Plaintiff's Motion for Modification of Order. Plaintiff requests that the Court allow Judge Bucklew to proceed with the Motion to Recuse or to instruct Judge Fawsett on the Motion to Recuse. After consideration, the Court denies the Motion. The prior order is self-explanatory and requires no modification....

Accordingly it is ORDERED that the Motion for Modification of Order is **denied....DONE and ORDERED** in Chambers on this *6th* day of March 2002.

Copies to: All parties and counsel of record

Elizabeth A. Kovachevich
ELIZABETH A. KOVACHEVICH
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
APR 11 2002
THOMAS K. KAHN,
CLERK

No. 01-11514-II

GABE KAIMOWITZ, Esquire, Qui Tam,
Plaintiff-Appellant,
USA ex rel,
Plaintiff,
versus
ORLANDO, FL, RICK BERNHARDT,
Defendants-Appellees.
ORLANDO NEIGHBORHOOD IMPROVEMENT CORPORATION ("ONIC"),
Defendant.

Appeal from the United States District Court
for the Middle District of Florida
February 14, 2002

Before TJOFLAT, CARNES, and HULL, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Gabe Kaimowitz, is DENIED.

ENTERED FOR THE COURT

Gerald Bard Tjoflat
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
APR 11 2002
THOMAS K. KAHN,
CLERK

No. 01-11514-II

GABE KAIMOWITZ, Esquire, Qui Tam,
Plaintiff-Appellant,
versus
ORLANDO, FL, RICK BERNHARDT,
Defendants-Appellees.
ORLANDO NEIGHBORHOOD IMPROVEMENT CORPORATION ("ONIC"),
Defendant.

Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, ___F.2d___).
Before TJOFLAT, CARNES, and HULL, Circuit Judges.

PER CURIAM:
The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT

Gerald Bard Tjoflat
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

FILED
2002 APR 25
PM 4:12
U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

ATTORNEYS AGAINST AMERICAN APARTHEID, by Gabe Kaimowitz, qui tam, pro se,
Plaintiff

-vs- **Case No. 6:01-cv-705-ORL-19DAB**

CITY OF ORLANDO, FL, by and through its Mayor Glenda Hood
Defendant.

ORDER

This case is before the Court on the Plaintiff Attorneys Against American Apartheid's Motion for Recusal of Judge Patricia C. Fawsett (Doc. No. 54) and Memorandum in support thereof (Doc. No. 55). (Note) *1–Plaintiff's Motion for Recusal was previously considered by the Court in an Order dated January 7, 2002. Id. (Doc. No. 56). In that Order the undersigned referred the Plaintiff's recusal motion to the Chief Judge of the Middle District of Florida for assignment to another Judge for resolution. See id. Chief Judge Kovachevich assigned the recusal motion to Judge Bucklew of the Tampa Division of the Middle District of Florida. See (Doc. No. 61). However, before Judge Bucklew ruled on the Motion, Chief Judge Kovachevich sua sponte vacated her referral 2 Order (Doc. No. 61) and reassigned the recusal motion back to the undersigned. See (Doc. No. 66).* Plaintiff seeks recusal under 28 U.S.C. § 455 (a) which provides:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

The purpose of Rule 455(a) is the promotion of public faith in the integrity of the judicial process. See, e.g., Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 859-60 (1988). A second aim of the recusal statutes, however, is to ensure that a judge does not recuse herself on "unsupported, irrational or highly tenuous speculation." United States v. Greenough, 782 F.2d 1556, 1558 (11th Cir.

1986). The standard for recusal under section 455(a) is "'whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality.'" United States v. Torkington, 874 F.2d 1441, 1446 (11th Cir. 1989)(quoting Parker v. Connors Steel Co., 855 F.2d 1510, 1524 (11th Cir. 1988)). Although the reach of section 455(a) is broad, it does have significant limits. The legislative history to section 455 cautions that it is not intended to be "used by judges to avoid sitting on difficult 2 or controversial cases." H. R. Rep. No. 93-1453, at 5, reprinted in 1974 U.S.C.C.A.N. at 6355; see also U.S. v. Bayless, 201 F.3d 116, 127 (2d Cir. 2000).

Plaintiff seeks recusal based upon the totality of the circumstances regarding the past litigation history between Plaintiff and the undersigned. Specifically, Plaintiff claims that the undersigned's rulings on recusal motions in prior cases brought by Plaintiff against the City of Orlando require recusal in the instant action. See (Doc. No. 54); see also U.S. et al, v. Orlando, 6:95-CV-204-ORL-19. The Plaintiff's allegations concerning prior rulings by the undersigned do not warrant recusal in this case as bias sufficient to support recusal under section 455(a) must be personal and stem from an extrajudicial source. McWhorter v. City of Birmingham, 906 F.2d 674, 678 (11th Cir. 1990). A judge's rulings in the same or a related case may not serve as a basis for a recusal motion. See id.; see also Diversified Numismatics, Inc., v. City of Orlando, FL, 949 F.2d 382, 385 (11th Cir. 1991).

Additionally, Plaintiff seeks recusal based on allegations that Defendant Glenda Hood, the Mayor of Orlando, has publicly supported the judges of the Orlando Division of the Middle District of Florida in their views relating to the construction of a new federal courthouse. See (Doc. No. 54). Specifically, Plaintiff cites to several Orlando Sentinel 3 newspaper articles in which Mayor Hood states that a new courthouse is important to the area and she supports the judges' complaints regarding the level of security at the proposed courthouse design. See id.. Plaintiff claims that a reasonable person may question the

undersigned's impartiality based on the alleged public support Mayor Hood has provided to the judges regarding the courthouse issue. The Court wishes to add the following facts to the record concerning this matter:

1) The undersigned judge has discussed the issue of the design and construction of the Orlando federal court annex with government officials at the municipal, county, and federal levels and with other persons. 2) The original design for this building consisted predominately (sic) of glass facades, and the building was to be located next to a busy interstate highway. 3) On two occasions prior to the redesign of this court annex, the undersigned judge discussed with Mayor Hood concerns about the then current design, including the concern that placement of a court annex with predominately glass facades next to the interstate highway was a danger to the Court and the surrounding community in downtown Orlando, Florida. 4) During the summer of 2001, the undersigned judge learned that the U.S. General Services Administration, which is in **4** charge of the design, construction, and ownership of the Orlando federal court annex, had caused the design of this building to be changed so that it was predominately of cladding and stone on the exterior instead of predominately glass facades. Further, the structure was located on the property in a position that placed a parking garage between it and the interstate highway. The redesign addressed the concerns of the undersigned judge. 5) The design and plans for construction of this building are ongoing under the auspices and control of the U.S. General Services Administration.

Plaintiff's allegations and the above referenced matters do not rise to a level that requires recusal under section 455. Specifically, a relationship with a public official regarding an issue other than matters pending before the Court in court proceedings does not require recusal of the presiding judge. See David v. City and County of Denver, 837 F. Supp. 1094 (D. Co. 1993). In David, a plaintiff who brought suit against the city and county moved to disqualify the judge based on the judge's relationship with certain members of the city police department who were also witnesses at trial. See id. at 1094. The judge had assisted

the police officials in the investigation of his son's homicide. See id. The David court found that despite this previous relationship and **5** assistance, the court's impartiality could not be reasonably questioned, and thus recusal was not warranted. See id. at 1096. The trial judge's decision to not recuse himself was upheld by the Tenth Circuit on appeal. See David v. City and County of Denver, 101 F.3d 1344 (10th Cir. 1996). Furthermore, the Eighth Circuit Court of Appeal dealt with a similar issue regarding recusal in United States v. Poludniak, 657 F.2d 948 (8th Cir. 1981). In Poludniak, the defendant in an extortion prosecution sought recusal of the trial judge based on the alleged bias in favor of a United States Senator who was the victim of the alleged extortion and an expected witness at trial. See id. at 953. The defendant's allegations of bias stemmed from a newspaper article, printed three weeks before defendant's trial, about security problems in the federal courthouse. See id. In the article the trial judge was quoted as saying he hoped to speak to the state's U.S. Senators to see whether he could get money to hire more marshals to improve security at the courthouse. See id. Immediately above the article regarding courthouse security appeared another article regarding the extortion case which identified the trial judge as handling the trial and named the particular U.S. Senator who was the victim of the alleged extortion. See id. Defendant moved to disqualify all of the district judges for the Eastern District of **6** Missouri based on section 455 (a).

The district judge refused to disqualify himself or the entire bench of his district. See id. at 954. The Eighth Circuit upheld this decision and found that:

> [a]lthough the juxtaposition of the two articles was unfortunate, we do not see how the judge's comments on the need for better security in the federal courthouse can require disqualification. Judge Wangelin was speaking in his official capacity as Chief Judge of the Eastern District of Missouri when he stated that he would soon be talking to Missouri's senators in Washington about securing additional funds for security. Courthouse security is his responsibility and, like all branches of the

government, he and his district must rely on Congress for money. To carry defendants' argument to its logical conclusion would suggest that all federal judges would have to disqualify in cases involving members of Congress, because they might appear to be partial to those who have the power of the purse.

Mayor Hood's alleged comments concerning the proposed courthouse design are similar to the comments at issue in Poludniak and similarly do not require disqualification. Mayor Hood merely commented that she supported the judges' complaints. Taken to its logical conclusion, Plaintiff's argument would require disqualification of all Middle District Judges in any case brought against the City of Orlando or its Mayor.

A reasonable person, knowing all the circumstances, would not conclude that there existed a relationship between the undersigned and Mayor Hood stemming from the public issue of a federal courthouse design or 7 construction that would compromise the impartiality of the Court. (*Note 2–additionally, where the alleged improper interest of the judge bears only a tangential relationship to the subject matter of the suit, the contention of bias is even further attenuated., See Brody v. President & Fellows of Harvard College, 664 F.2d 10, 12 (lst Cir. 1981). Such is the case here where the alleged comments and alleged relationship with Mayor Hood are not directly related to the subject matter of the suit.*)

Finally, Plaintiff makes vague allegations concerning former law partners of the undersigned and their connection to the instant case. Specifically, Plaintiff alleges that former partner Pat Christiansen heads a committee for Mayor Hood to propose changes for the Parramore neighborhood. See (Doc. No. 54). Additionally, Plaintiff claims former partner Rob Mellen has worked for the Orlando Neighborhood Improvement Corporation since 1991. See id. These allegations, without more, do not require disqualification.

These former partners are not parties to the litigation or attorneys for any party. Plaintiff has not alleged specific facts which show these former partners' connection to the

instant case. Moreover, recusal is not required merely because a judge has a professional or even social relationship with an attorney or witness. See United States v. Murphy, 768 F.2d 1518, 1537 (7th Cir. 1985); Parrish v. Bd. of Commissioners, 524 F.2d 98, 104 (5th Cir. 1975); In re United States, 666 F.2d 690 (lst Cir. 1981).(*after note 2*) **8** Accordingly, the Court finds that Plaintiff's allegations of bias and prejudice do not rise to a level which requires recusal. Based on the foregoing, the Court **RULES** that Plaintiff Attorneys Against American Apartheid's Motion for Recusal of Judge Patricia C. Fawsett (Doc. No. 54) is **DENIED**. DONE AND ORDERED at Orlando, Florida, this *25th* day of April, 2002. *Patricia C. Fawsett*

PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

Copies to: All Counsel of Record **9**

UNITED STATES DISTRICT COURT

FILED
MIDDLE DISTRICT OF FLORIDA 02 SEP 18 AM 10:10
ORLANDO DIVISION U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

UNITED STATES OF AMERICA, ex rel, ATTORNEYS AGAINST, by Gabe Kaimowitz, qui tam, Plaintiff,

vs. **CASE NO. 6:01-cv-705-ORL-19KRS**
CITY OF ORLANDO, FL, et al., Defendant.

ORDER

The undersigned judge having been apprised that an investment in which she holds an interest will undertake negotiations with the City of Orlando in the near future, I hereby recuse myself from further proceedings in this case and direct that the case be reassigned to another District Court Judge.

DONE AND ORDERED at Orlando, Florida, this *17th* day of September, 2002. *Patricia C. Fawsett*

PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

Copies to: All counsel of record.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
NOV 22, 2002
THOMAS K. KAHN,
CLERK

No. 01-3857-II

Non-Argument Calendar

D. C. Docket No. 95-0204-CV-ORL-19B

GABE KAIMOWITZ, Esquire, Qui Tam,
UNITED STATES ex rel, Plaintiffs-Appellants,
versus
JOHN REBER, Interested Party-Appellee.

No.01-13858-II,

D. C. Docket No. 95-0020o4-CV-ORL

Non-Argument Calendar

GABE KAIMOWITZ, Esquire, Qui Tam,
UNITED STATES ex rel, Plaintiffs-Appellants,
versus
ORLANDO NEIGHBORHOOD IMPROVEMENT CORPORATION ("ONIC"), Defendant-Appellee.

Appeals from the United States District Court
for the Middle District of Florida

(November 22, 2002)

Before TJOFLAT, BLACK, AND MARCUS,
Circuit Judges.

PER CURIAM:

Gabe Kaimowitz, a Florida lawyer proceeding pro se, appeals the district court's denial of his motion to impose sanctions on John Reber, counsel for 2 defendant Orlando Neighborhood Improvement Corporation ("ONIC"), pursuant to Rule 11 of the Federal Rules of Civil Procedure (Appeal No. 01-13857) and the court's denial of ONIC's motion for attorney's fees and his motion filed under Rules 59 and 60 to alter or amend the court's denial of defendant ONIC's motion for attorney's fees (Appeal No. 01-13858).

As an initial matter, Kaimowitz observes that, "[e]ach active judge in this Circuit has received or should have received [his] version of the more than 15 years of prejudice exhibited by Judge Fawsett against him, especially when he is litigating for himself or for his clients against Orlando." He contends that Judge Fawsett is biased in favor of Orlando and its agencies, including ONIC, and that, as a result, she has refused to deter the defendants from any wrongdoing, even when such wrongdoing has been pointed out by the magistrate judge.

As indicated above, these consolidated appeals challenge only the district court's orders first denying ONIC's motion for attorney's fees and Kaimowitz's Rule 59/60 motion to alter or to amend the denial of attorney's fees for ONIC and second refusing to impose Rule 11 sanctions against Reber. In an earlier appeal, we rejected Kaimowitz's argument that Judge Fawsett should have recused herself in this case. Consequently, the matter of her refusal to recuse is not properly before us. **3**

Moreover, the law of the case doctrine forecloses this issue from reconsideration. "The law of the case doctrine, self-imposed by the courts, operates to create efficiency, finality, and obedience within the judicial system." United States v. Tamayo, 80 F.3d 1514, 1520 (11th Cir. 1996)(citations omitted). An appellate decision binds all subsequent proceedings in the same case, not only as to explicit rulings, but also as to issues necessarily decided by implication in the prior appeal.

We are bound by the law of the case doctrine, as is the district court, unless (1) a subsequent trial produces substantially different evidence, (2) controlling authority since has made a contrary decision of law applicable to that issue, or (3) a prior decision was clearly erroneous and would work manifest injustice. United States v. Stinson, 97 F.3d 466, 469 (11th Cir. 1996), cert. denied, 519 U.S. 1137 (1997). No exception to the law of the case doctrine exists here.

Kaimowitz does not address in his brief whether the district court erred in denying defendant ONIC's motion for attorney's fees and his motion to alter or amend the order

refusing to award ONIC attorney's fees. We therefore consider these issues as waived, and do not consider them. United States v. Ford, 270 F.3d 1346, 1347 (11th Cir. 2001), cert. denied, 122 S.Ct. 2297 (2002).

Turning to the sanctions issue that remains, Kaimowitz argues that, because the magistrate acknowledged that he, ONIC's co-defendants, and the courts were 4 prejudiced by ONIC's untimely motion for attorney's fees, sanctions against Reber, ONIC's attorney, were warranted.

Denial of a motion for Rule 11 sanctions is reviewed for an abuse of discretion. Beck v. Prupis, 162 F.3d 1090, 1100 (11th Cir. 1998), aff'd 529 U.S. 494 (2000). Under Rule 11(c), "[i]f, after notice and a reasonable opportunity to respond," the court determines that a party has made misrepresentations to the court, the court may impose sanctions on the violators. Fed. R. Civ. P. 11(c). A motion for sanctions may be made by a party, but it cannot be presented to the court, unless within 21 days after service of the motion, the challenged document has not been withdrawn or corrected. Fed.R.Civ.P. "A party seeking sanctions should give notice to the court and the offending party promptly upon discovering a basis for doing so." See Fed R. Civ. P. 11 (advisory committee notes to 1983 amendment.)

In this case, Kaimowitz failed to comply with the dictates of Rule 11(c). The district court therefore did not abuse its discretion in denying his motion for sanctions. AFFIRMED. **5**

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
NOV 22, 2002
THOMAS K. KAHN,
CLERK

No. 01-3857-II

Non-Argument Calendar

D. C. Docket No. 95-00204-CV-ORL-19B

GABE KAIMOWITZ, Esquire, Qui Tam,
UNITED STATES ex rel, Plaintiffs-Appellants,
versus
ORLANDO, FLORIDA, RICK BERNHARDT, et al.,
Defendants,
JOHN REBER, Interested Party-Appellee.

No.01-13858-II,

D. C. Docket No. 95-00204-CV-ORL-19B

Non-Argument Calendar

GABE KAIMOWITZ, Esquire, Qui Tam,
UNITED STATES ex rel, Plaintiffs-Appellants,
versus
ORLANDO NEIGHBORHOOD IMPROVEMENT
CORPORATION ("ONIC"), Defendant-Appellee.

Appeals from the United States District Court
for the Middle District of Florida

(November 22, 2002)

Before TJOFLAT, BLACK, AND MARCUS,
Circuit Judges.

The Court having been polled at the request of one of the members of the Court on hearing en banc, and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5, the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Gerald Bard Tjoflat
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT FILED
MIDDLE DISTRICT OF FLORIDA 03 JAN 14 AM9:15
ORLANDO DIVISION U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

UNITED STATES OF AMERICA,
ex rel, GABE KAIMOWITZ, an attorney
qui tam, pro se, Plaintiff,
6:95-Cv-204-ORL-19 DAB
vs. CASE NO. 6:03-CV-1509-ORL-19JGG (x'd out)[1]
ORLANDO, FLA; RICK BERNHARDT, its
Planning and development director, and the
ORLANDO NEIGHBORHOOD IMPROVEMENT
CORPORATION, Defendants.

ORDER

The undersigned judge having been apprised that an investment in which she holds an interest will undertake negotiations with the City of Orlando in the near future, I hereby recuse myself from further proceedings in this case and direct that the case be reassigned to another District Court Judge.

DONE AND ORDERED at Orlando, Florida, this *13th* day of January 2003.

Patricia C. Fawsett
PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

Copies to: All Counsel of Record

1–Judge Fawsett recused herself on December 31, 2002, in a third False Claims Act case brought for the United States against Orlando and others. That action was assigned the same case number as was deleted above. Judge Fawsett stated the same basis for her recusal in that matter.

UNITED STATES DISTRICT COURT FILED
MIDDLE DISTRICT OF FLORIDA 03 JAN 17PM2:12
ORLANDO DIVISION U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

GABE KAIMOWITZ,
Plaintiff,

-vs- Case No. **6:95-Cv-204-ORL19-DAB**

ORLANDO, FLORIDA,
Defendant.

ORDER

This cause came on for consideration without oral argument on the following motion filed herein

MOTION: MOTION/MEMORANDUM OF LAW IN SUPPORT OF RECUSAL OF JUDGE PATRICIA FAWSETT,. PURSUANT TO 28 U.S.C. 455(a) OR (b) (Doc. No. 682)

FILED: January 15, 2003

THEREON it is **ORDERED** that the motion is **DENIED** as moot.

DONE and ORDERED in Chambers, Orlando, Florida, this *17* day of January 2003.

John A----------
JOHN ANTOON II
United States District Judge

Copies furnished to:
Counsel of Record
Unrepresented Party

UNITED STATES DISTRICT COURT FILED
MIDDLE DISTRICT OF FLORIDA 03 FEB 11 AM 9:13
ORLANDO DIVISION U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
GABE KAIMOWITZ, ORLANDO, FLORIDA
Plaintiff,
-vs- Case No. **6:95-Cv-204-ORL-28DAB**
ORLANDO, FLORIDA, RICK BERNHARDT, its planning and development director; and the **ORLANDO NEIGHBORHOOD IMPROVEMENT CORPORATION**,
Defendants

ORDER

This cause is before the Court on the following four pending motions:

• The Motion/Memorandum of Law in Support of Recusal of Judge John Antoon, Pursuant to 28 U.S.C. § 455)(a) (Doc. 685, filed January 27, 2003) filed by Plaintiff Gabe Kaimowitz;

• Plaintiff's Motion/Legal Authority for Correction of Clerical/Judicial Error (Doc. 684...January 27, 2003);

• The Motion for Writ of Garnishment (Doc. 673, filed November 27, 2002) filed by Defendants Orlando, Florida and Rick Bernhardt; and

• Defendants' Motion for Continuing Writ of Garnishment with Supporting Legal Authority (Doc. 675, filed December 24, 2002).

Each of these motions will be addressed in turn.

I. Motion for Recusal (Doc. 685). In this motion, Plaintiff Kaimowitz seeks recusal of the undersigned United States District Judge under 28 U.S.C. §455(a) based on the undersigned's recusal in another case pending in this division of this district, United States of America ex rel Attorneys Against Apartheid (sic), by Gabe Kaimowitz, qui tam, v. City of Orlando and its mayor Glenda Hood, Case No. 6:01-cv-705. Upon consideration of the motion for recusal, the undersigned finds that recusal is not warranted.

Section 455(a) of Title 28 of the United States Code provides that "[a]ny justice, judge or magistrate of the United States shall disqualify himself in any proceeding in

which his impartiality might reasonably be questioned." "Prior recusals, without more, do not objectively demonstrate an appearance of partiality."Diversified Numismatics, Inc. v. City of Orlando, 949 F.2d 382, 385 (11th Cir. 1991).

Although the undersigned determined in December 2001 that recusal was warranted in Case No. 6:01-cv-705 based on Mayor Hood's support of a proposed new federal courthouse in Orlando, the undersigned was overly cautious in recusing himself in that case. *Cf.* Martin v. Monumental Life Ins. Co., 240 F.3d 223, (3rd Cir. 2001)(noting that "[a]lthough the judge offered to recuse himself in the [prior] action, he did so out of excess caution," and finding that judge properly declined to recuse himself in later case). Upon reflection, the undersigned agrees with the well-reasoned Order of Judge Conway (Doc. 124 in Case No. 6:01-cv-705) denying the motion for her recusal in that case, wherein Judge Conway determined that the city's and the mayor's support for the construction of a new federal courthouse did not mandate recusal under 28 U.S.C. §455(a) absent "demonstration -2- of a personal, extra-judicial relationship that would compromise a court's objectivity and fairness" (Doc. 124 in Case Nol. 6:01-cv-705, at 15). In accordance with Judge Conway's reasoning and the cases cited in her Order, the undersigned finds that there is no basis for his recusal in this case, as the city's support of a new federal courthouse does not raise a reasonable question as to the undersigned's impartiality as required for recusal under 28 U.S.C. §455a. (*Note 1–This court also notes that Mayor Hood is not a party to the instant case.*) Hence, Plaintiff Kaimowitz's recusal motion shall be denied.

II. Plaintiff's for Correction of Clerical/Judicial Error (Doc. 684). In this motion, Plaintiff challenges the caption of "an Order by Judge John Antoon II" which "incorrectly lists only one Defendant, rather than several," (Doc. 684 at 1). Plaintiff does not otherwise identify the Order he seeks to have corrected, but it appears he is referring to the Order (Doc. 683, filed January 17, 2003), denying as moot Plaintiff's Motion for Recusal of Judge Patricia Fawsett. The Court finds this motion to be totally devoid of merit, and

it shall be denied.

III. The Motions for Writ of Garnishment (Doc. 673) and for Continuing Writ of Garnishment (Doc. 675). In these motions, Defendants Orlando, Florida, and Rick Bernhardt seek a writ of garnishment under Federal Rule of Civil Procedure 69 and Chapter 77, Florida Statutes, against Alachua County, Florida. On December 19, 2002, the assigned United States Magistrate Judge issued a Report and Recommendation (Doc. 674)(recommending that the first motion (Doc. 673) be denied without prejudice because under state law "a county is (*after note 1*)-3- immune from garnishment proceedings, except if the judgment debtor is an employee of the county and owed wages" (Doc. 674 at 1). As noted in that Report, the first motion is silent as to the type of relationship that exists between Alachua County and Plaintiff Kaimowitz. No objections to the Report have been filed. After the first Report was filed, Defendants Orlando, Florida, and Rick Bernhardt filed a second garnishment motion, Defendants' Motion for Continuing Writ of Garnishment (Doc. 675), in which they alleged that Plaintiff Kaimowitz was owed wages by Alachua County. On January 14, 2003, the United States Magistrate issued a Report and Recommendation (Doc. 679) recommending that the second motion be denied because Plaintiff Kaimowitz is not an Alachua County employee to whom wages are owed; instead, Plaintiff Kaimowitz filed a lawsuit after his termination from employment with Alachua County seeking damages rather than wages. Thus, the Report notes, a writ of garnishment against Alachua County is not available to the movants. No objections to the Report have been filed.

After an independent review, and noting that no objections to the Reports have been filed, the Court agrees with the findings and conclusions in the Reports. The Reports shall be adopted by the Court and the garnishment motions shall be denied.....-4- DONE and ORDERED in Chambers, Orlando, Florida, this *17* day of January 2003.

John A----------
JOHN ANTOON II
United States District Judge

Copies furnished to:
Counsel of Record,
Unrepresented Party United States Magistrate.... -5-

IN THE UNITED STATES COURT OF APPEAL
FOR THE ELEVENTH CIRCUIT
No. 03-10166-B

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FEB. 14 2003
THOMAS K. KAHN
CLERK

Dist.Ct.Docket No. 01-00705-CV-ORL-22

IN RE: GABE KAIMOWITZ, Petitioner.

On Petition for Writ of Mandamus to the
United States District Court for the
Middle District of Florida

A TRUE COPY ATTESTED
CLERK, U.S. COURT
OF APPEALS
ELEVENTH CIRCUIT
By: *Gladys H. Briggs*
Deputy Clerk, Atlanta,GA

BEFORE: DUBINA and MARCUS, Circuit Judges

BY THE COURT:

Gabe Kaimowitz petitions this Court for a writ of mandamus relating to his civil action under the False Claims Act, 31 U.S.C. §3729. He seeks to compel the district court judge to recuse herself based on several allegations of bias, or alternatively, for this Court to transfer his case to another division of the Middle District of Florida.

The question of disqualification of a trial judge is reviewable on mandamus, but the writ will issue only in drastic situations, when no other adequate means are available to remedy a clear usurpation of power or abuse of discretion. In re Lopez-Lukis, 113 F.3d 1187, 1187-88 (11th Cir. 1997), Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999, 1004 (11th Cir. 1997). The petitioner has the burden of showing that the claimed right to issuance of the writ is clear and indisputable. Lopez-Lukis, 113 F.3d at 1188. A judge must disqualify herself "in any proceeding in which [her] impartiality might reasonably be questioned." 28 U.S.C. §455(a). Disqualification is required only when

the alleged bias is personal in nature, meaning that it stems from an extra-judicial source. Liteky v. United States, 510 U.S. 540, 553, 114 S.Ct. 1147, 1157, 127 L.Ed.2d 474 (1994); Loranger v. Stierheim, 10 F.3d 776, 7809 (11th Cir. 1994). Generally a judge's rulings in a case are not valid grounds for recusal. Liteky, 510 U.S. at 555; Loranger, 10 F.3d at 780. In rare cases, recusal may be required when "such pervasive bias and prejudice is shown by otherwise judicial conduct as would constitute bias against a party." Loranger, 10 F.3d at 780. Mere friction between court and counsel is not enough to demonstrate pervasive bias. Thomas v. Tenneco Packaging Co., 293 F.3d 1306, 1329 (11th Cir. 2002) (quotations omitted).

Kaimowitz has not established extraordinary circumstances warranting mandamus relief. Much of his allegations stem from adverse rulings Judge Conway has made (or that he anticipates she will make) in this case and in previous cases in which he was involved. The mere fact that Judge Conway previously has ruled adversely to Kaimowitz, does not, by itself, establish pervasive bias. Furthermore, although Kaimowitz asserts that Judge Conway formally was associated with an organization that became adverse to him when it fired him, he has not shown that she was involved in the organization at the time, and, in fact, Judge Conway asserted to the contrary in her **2** order denying the motion for recusal. See, e.g., Huff v. Standard Life. Ins. Co., 683 F.2d 1363, 1369-70 (11th Cir. 1982)(holding that a judge's prior association with a firm that is adverse to a party does not show pervasive bias. Recusal is not required even when a party has made complimentary statements about the judge, as it is not reasonable to believe that a judge would be influenced in favor of the party based on such support. Schultz v. Newsweek, Inc., 668 F.2d 911, 919 (6th Cir. 1982).

With regard to Kaimowitz's request that we transfer the case to another division of the Middle District of Florida, he has an adequate alternative remedy in that he can move for such relief in the district court, pursuant to 28 U.S.C. §1404(b). For all of the above reasons, Kaimowitz's mandamus petition is **DENIED. 3**

UNITED STATES DISTRICT COURT FILED
MIDDLE DISTRICT OF FLORIDA 03 FEB 24 AM9:50
ORLANDO DIVISION U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
GABE KAIMOWITZ, ORLANDO, FLORIDA
Plaintiff,
-vs- Case No. **6:95-Cv-204-ORL-28DAB**
ORLANDO, FLORIDA, RICK BERNHARDT, its planning and development director; and the ORLANDO NEIGHBORHOOD IMPROVEMENT CORPORATION,
Defendants.

ORDER

This cause is before the Court on "Motion/Memo of Law for Reconsideration of an Order Refusal of Recusal" (Doc. 691, filed February 18, 2003) and the Motion for Temporary Restraining Order (Doc. 692, filed February 21, 2003), both filed by Plaintiff Gabe Kaimowitz. Upon consideration, it is ORDERED as follows:

1. The "Motion/Memo of Law for Reconsideration of an Order Refusal of Recusal" (Doc. 691, filed February 18, 2003) is **DENIED**. The basis for recusal raised by Plaintiff was recently rejected by the Eleventh Circuit in its denial of a petition for writ of mandamus in a case pending before another judge of this court. See Order on Petition for Writ of Mandamus, In re Kaimowitz, 11th Cir. Case No. 03-10166-B (issued as mandate Feb. 14, 2003). ("Lastly Kaimowitz's allegation that his adversaries supported Judge Conway in her efforts at negotiating to obtain a new courthouse does not show pervasive bias. Recusal is not required even when a party has made complimentary statements about the judge, as it is not reasonable to believe that a judge would be influenced in favor of the party based on such support.")(Doc. 167 in M.D. Fla. Case No. 6:01-cv-705-Orl-22, at 3)....DONE and ORDERED in Chambers, Orlando, Florida, this *17* day of January, 2003. *John A*-------

JOHN ANTOON II
United States District Judge

Copies furnished to:
Counsel of Record Unrepresented Party

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
MAR 25, 2003
THOMAS K. KAHN,
CLERK

No. 01-3857-II

Non-Argument Calendar

GABE KAIMOWITZ, Esquire, Qui Tam,
UNITED STATES ex rel, Plaintiffs-Appellants,
versus
ORLANDO, FL, RICK BERNHARDT, et al.,
Defendants.
JOHN REBER, Interested Party-Appellee.

No.01-13858-II,

D. C. Docket No. 95-00204-CV-ORL

Non-Argument Calendar

GABE KAIMOWITZ, Esquire, Qui Tam,
UNITED STATES ex rel, Plaintiffs-Appellants,
versus
ORLANDO, FLORIDA, RICK BERNHARDT,
Defendants,
ORLANDO NEIGHBORHOOD IMPROVEMENT
CORPORATION ("ONIC"), Defendant-Appellee

On Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC
(Opinion , 11th Cir., 19__,
__F.2d__).

Before: TJOFLAT, BLACK and MARCUS,
Circuit Judges,

PER CURIAM:

The Petition(s) for Rehearing are DENIED, and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

Gerald Bard Tjoflat
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
MAR 25, 2003
THOMAS K. KAHN,
CLERK

No. 01-3857-II

GABE KAIMOWITZ, Esquire, Qui Tam,
UNITED STATES ex rel, Plaintiffs-Appellants,
versus
ORLANDO, FL, RICK BERNHARDT, et al.,
Defendants.

JOHN REBER, Interested Party-Appellee.

No.01-13858-II

GABE KAIMOWITZ, Esquire, Qui Tam,
UNITED STATES ex rel, Plaintiffs-Appellants,
versus
ORLANDO, FLORIDA, RICK BERNHARDT,
Defendants.
ORLANDO NEIGHBORHOOD IMPROVEMENT
CORPORATION ("ONIC"), Defendant-Appellee

Appeal from the United States District Court
for the Middle District of Florida

BEFORE: TJOFLAT, BLACK and MARCUS,
Circuit Judges.

On the court's own motion this court's order of February 25, 2003, is recalled.

Appellant's "motion to have this court review rejection of a supplement to the record"...construed as appellant's motion for reconsideration of this court's order of February 7, 2003 is DENIED.

IN THE UNITED STATES COURT OF APPEAL
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
APR. 1 2003
THOMAS K. KAHN
CLERK

No. 03-10166-B

Dist.Ct.Docket No. 01-00705-CV-ORL-22

IN RE: GABE KAIMOWITZ, Petitioner.

On Petition for Writ of Mandamus to the United States District Court for the Middle District of Florida

BEFORE: DUBINA and MARCUS, Circuit Judges.
BY THE COURT:

Gabe Kaimowitz has filed an "Emergency Motion Based on New Evidence Obtained from an Extra Judicial Source to Stay or Set Aside Mandate on Petition for Writ of Mandamus," which we construe as a motion for reconsideration of our February 14, 2003 order denying his petition for a writ of mandamus. In his mandamus petition, Kaimowitz sought to compel the district court judge to recuse herself based on several allegations of bias, or alternatively, for this Court to transfer his case to another division of the Middle District of Florida. In his motion for reconsideration, Kaimowitz presents new evidence in the form of a letter from the district court judge to a building administrator, in which the judge notes that Orlando Mayor Glenda Hood, a defendant in Kaimowitz's law suit, had arranged a meeting to discuss plans for the courthouse annex, which does not constitute pervasive bias. As we held in denying Kaimowitz's mandamus petition, recusal is not required merely because a party has demonstrated support of a judge. See Schultz v. Newsweek, 668 F.2d 911, 919 (6th Cir. 1982)(holding that recusal was not necessary where a party made complimentary statements about the judge, as it was not reasonable to believe that a judge would be influenced in favor of that party based on such support.) Accordingly, Kaimowitz's motion for reconsideration is **DENIED**.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

FILED
03 MAY 1 PM4:34
CLERK,
U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

UNITED STATES OF AMERICA, ex rel, ATTORNEYS AGAINST AMERICAN APARTHEID, by Gabe Kaimowitz, qui tam,

Plaintiffs,

vs.

Case No. 6:01-cv-705-Orl-22KRS

CITY OF ORLANDO, FL and GLENDA HOOD, etc., et al.,

Defendants.

ORDER

Upon the Court's own motion the undersigned judge determines the interests of justice would be served by recusal from this case. See 28 U.S.C. § 455(a).

The clerk is directed to reassign this case to another district judge.

DONE and **ORDERED** in Chambers, in Orlando, Florida this *1st* day of May 2003.

Anne C. Conway
ANNE C. CONWAY
United States District Judge

Copies furnished to:

Counsel of Record
Unrepresented Party
Division Manager

UNITED STATES DISTRICT COURT FILED
MIDDLE DISTRICT OF FLORIDA 03 MAY 6 PM2:53
ORLANDO DIVISION CLERK,
U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

UNITED STATES OF AMERICA,
ex relator, ATTORNEYS AGAINST
by Gabe Kaimowitz, qui tam,
Plaintiffs,

vs. **Case No. 6:01-cv-705-Orl-22KRS**
CITY OF ORLANDO, Florida,
Defendants.

ORDER

Each of the Resident Active Judges in the Orlando Division and Senior Judge G. Kendall Sharp having entered Orders of Recusal in this case, the Clerk is directed to TRANSFER this case to the Tampa Division of this Court where it shall be randomly assigned under the blind assignment system to a District Judge and Magistrate Judge in the Tampa Division. See 28 USC §137.

DONE AND ORDERED at Orlando, Florida this *6th* day of May, 2003. *Patricia C. Fawsett*

PATRICIA C. FAWSETT
UNITED STATES DISTRICT CHIEF JUDGE[1]

1–The U.S. Senate approved Judge Fawsett as chief on April 18, 2003. She succeeded Judge Elizabeth A. Kovachevich of the Tampa Division. Judge Kovachevich served as chief for more than a decade.

TRANSCRIPT EXCERPT

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO: 8:03-Cv-862-T-26EAJ

UNITED STATES OF AMERICA Tampa, Florida
ex relator ATTORNEYS
AGAINST AMERICAN APARTHEID,
by Gabe Kaimowitz, qui tam,
Plaintiffs,
vs.
City of Orlando,
Glenda E. Hood, Mayor.
Defendants.

_____/

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

APPEARANCES:

Counsel for Plaintiff: GABE KAIMOWITZ, ESQUIRE
P.O. Box 140119
Gainesville, Florida 32614
352-375-2670

Counsel for Defendants: BOBBY G. PALMER, ESQUIRE
Hilyard, Bogan, Palmer & Lockeby
P.O. Box 4973
Orlando, Florida 32802-4973
407-425-4251

Court Reporter: CLAUDIA SPANGLER-FRY, RPR, CM
Official Court Reporter
801 North Florida Avenue
Room 1548
Tampa, Florida 33602
813-301-5575

_____

CLAUDIA SPANGLER-FRY,
OFFICIAL U.S. COURT REPORTER

TRANSCRIPT EXCERPT: (*Starting at line 23, p. 31*)
MR. KAIMOWITZ:...(W)ith regard to the other case, I want to put on record, that's why I want to finish, I have moved to set aside the very judgment as having been obtained by fraud....

(*Starting at line 4, p. 32*)
THE COURT: Is that pending; have you filed that over in Orlando?
MR. KAIMOWITZ: Yes, that is pending and I have filed it.
....
THE COURT: Okay. Who's got that over there?....
MR. KAIMOWITZ: Judge Antoon.

THE COURT: Who's going to recuse himself.

(*Starting at line 1, p. 33*)
MR. KAIMOWITZ: Thank you, Your Honor. That's the way the world works.

THE COURT: Well...are you going to make a Motion to Recuse him?
MR. KAIMOWITZ: Two I have already lost....

THE COURT: I know that Judge Antoon granted your motion...didn't he-
MR. KAIMOWITZ: In this case. He wouldn't do it in the other case.

THE COURT: Okay.
MR. KAIMOWITZ: Judge Conway is not doing it in the third False Claims Act case.

THE COURT: Okay....I didn't know there was a third case.
MR. KAIMOWITZ: All I want is that on the record.

THE COURT. Okay. It's on the record....
(*Last line is line 19, p. 33*).

MONEY COMES THROUGH FOR U.S. COURTHOUSE–A spending bill passed by Congress this week had money to buy land in Orlando for an annex that adds space for judges (Metro Edition) Sean Holton, Washington Bureau, **Orlando Sentinel,** Orlando, Fl **Oct. 3, 1996 pg. D3–**A long-awaited Orlando federal courthouse annex derailed by slapstick politics two years ago got back on track this week thanks to a huge spending bill passed by Congress, area lawmakers learned Wednesday. Buried deep in a 16-pound stack of legislation providing $600 billion to keep federal agencies open for another year is $9.5 million appropriation to launch the Orlando project.

The money will be used to buy land adjacent to the site of the current 1970s-era federal building on Hughey Avenue. The land envisioned for the annex is in several parcels, including the site of the old Greyhound Bus terminal and the Lamar Hotel for transients. Plans ultimately call for building a $50-million, 157,600-square-foot structure there to house U.S. District Court operations. Court officials hope to get more money for design next year and to begin construction in January 2000. "Good news. I'm very, very pleased," said U.S. District Judge Patricia Fawsett, who learned of the approval from U.S. Rep. Bill McCollum, R-Longwood. "I was extremely surprised."

Fawsett said consolidated court operations in the new building will be more efficient and secure than the current cramped setup, which, among other things, requires judges to share corridors with prisoners. "We're constantly rounding the corner and running into people we have either sentenced or are going to sentence," Fawsett said. Current courtrooms "were designed for friendlier, simpler times, I guess," she said. Space now occupied by the district court will be available for use by the bankruptcy court which is now in leased space....The annex money was all but approved in 1994 but got cancelled in the political equivalent of Keystone Kops. Then-House Speaker Tom Foley, D-Washington, killed the project to punish McCollum for giving money to Foley's opponent in that year's election.
http:...../78058318.html?MAC=536f65fb1d63e447a42bb88900086eed&did=78058318&FMT=F

February 23, 1998
Mr. Walter G. Moon,
Chief Projects Development and Management Branch,
Administrative Office of the U.S. Courts
One Columbus Circle, NE, Suite G-100,
Washington, D.C. 20544
Dear Mr. Moon:
Thank you for meeting with me last week during your visit to Atlanta. GSA has reviewed the information you provided regarding the justification for eighteen courtrooms in Orlando (e.g. February 13 letter to Mr. William J. Guerin). Based on your letter, we request the following documents:
1. The updated, approved District Long Range Plan.
2. The approved, official court model for the Courthouse Annex only (14 courtrooms).
3. The approved courtroom utilization study for the Courthouse Annex.
GSA has already drafted the Commerce Business Daily announcement anticipating the commencement of A/E selection shortly, and prefers to have this square footage issue officially resolved prior to placing that announcement. We would appreciate receipt of the aforementioned information by March 2. If you have any questions, please contact me at (404) 331-7657. Thank you.

Sincerely,
Stacy M. Cowles, Project Manager
Property Development Division
cc: Honorable Elizabeth A. Kovachevich
Honorable Patricia C. Fawsett
Honorable Joseph W. Hatchett[1]
Mr. Norman E. Zoller[2] Mr. Richard D. Sletten[3]
Mr. Jack Chandler[4]

1–He was chief judge of the 11th Circuit Court of Appeals.

2–He was chief executive of the 11th Circuit Court of Appeals.

2–He was Clerk of the Court, U.S. Court, MD, Fla.

3–He was an 11th Circuit representative.

March 2, 1998
MEMORANDUM FOR: JUDGE FAWSETT
JUDGE KOVACHEVICH, RICHARD SLETTEN
LARRY SMITH, JACK CHANDLER....
FROM: STACY M. COWLES PROJECT MANAGER
SUBJECT: New U.S. Courthouse Annex Orlando, FL
Architect-Engineer (A-E) Selection Process Meeting
Please plan to attend a meeting on Thursday, March 19, 1998, at 9:00 a.m., in the George C. Young Federal Building-Courthouse, 80 North Hughey Avenue, Orlando, FL. The location within the building for this meeting is yet to be determined. The purpose of the subject meeting is to provide clear direction regarding the A-E Source Selection process for the Courthouse Annex. We will provide detailed information concerning the activities to be performed during the stages of the process, criteria to be examined, time commitments required for same, and other issues relating to the selection of an A-E for this project. An agenda will be transmitted to all parties prior to the meeting. If you have any questions, please contact me at (404) 331-7657.....

FROM THE ORLANDO SENTINEL, Mar. 18, 1998, pp. A-1, A-8 New land war starts over site for courthouse –☐A U.S. suit tries to seize downtown Orlando property and pay owner a third of what he wants.
By Jim Leusner and Sherri Owens, of the Sentinel Staff

After nine months of unsuccessful negotiations, the federal government filed a lawsuit Tuesday to seize 3.8 acres of prime downtown Orlando real estate for a new courthouse site. The condemnation action, filed in federal court, promises $3.4 million to Carolina Florida Properties, Inc. The company owns the corner tract at Central Boulevard and Hughey Avenue, west of Interstate 4 near the Church Street entertainment complex.

The lawsuit and accompanying motions to take the property will require the approval of U.S. District Judge Patricia Fawsett–one of the judges who would occupy space in the new building. If both parties cannot agree on that sale price, then a jury trial will determine what is "just compensation" for the land...Assistant U.S. Attorney Ralph Hopkins filed the suit on behalf of the government's landlord, the General Services Administration.

The government has $3.4 million ready to pay the landowners once the property is taken, he said....

The property....has been the site of the Lamar Hotel, Miller's Machinery, Mid-Florida Lighting, and the old Greyhound bus terminal. It is adjacent to the federal courthouse at 80 N. Hughey Ave., which opened in 1976.

The current six-story courthouse, with its crowded court facilities, and outdated security features, would remain an annex to the new building....The courthouse project reflects the growing federal court system. A Tampa courthouse was dedicated in December, and others are under construction in Jacksonville and Fort Myers.

U.S. District Court Middle District of Florida (Orlando)
CIVIL DOCKET FOR CASE #6:98cv00308

USA, et al., v. 3.864 Acres of Land, et al., Filed 03/17/98
Assigned to Judge Maurice B. Cohill, Jr. Jury demand:
Both Demand: $0.000 Nature of Suit: 210
Lead Docket: None Jurisdiction: US Plaintiff
Dkt# in other court: None
Cause: 40:258(a) Public Buildings
& Property: Land Condemnation[1]

Parties	[] *Attorneys*
USA plaintiff	Ralph Hopkins....
	U.S. Attorney's Office
	....
	David Othel Vollenweider III
	....
	U.S. Department of Justice
	Land Acquisition Section.....

v.

3.864 ACRES OF LAND, known as the South half of the block bounded by Central Boulevard on the South, Hughey Avenue on the East, Washington Street on the North, and Division Avenue to the West, in the City of Orlando, Orange County, Florida, defendant....

[1] --The U.S. sought to condemn land for the proposed U.S. Courthouse annex in the Southwest Quarter of Orlando.

CAROLINA FLORIDA [] Jon Martin Wilson....
PROPERTIES Inc., a Florida Corporation, defendant.

Docket Proceedings ....

Date	Doc. #	Image	Docket Entry
03/17/98	1		COMPLAINT in condemnation and demand for jury trial filed-land condemnation action (spr)
....	....		....
Date	**Doc. #**	**Image**	**Docket Entry**
03/17/98	7		ORDER directing counsel to review and certify compliance with Local Rule 1.04(c) within 10 days. (Signed by Judge Patricia C. Fawsett) ctc (spr) [Entry date 03/18/98)
03/18/98	8		NOTICE of designation under Local Rule 3.05-TRACK 2.
03/18/98	9		ORDER transferring case to the Honorable Joseph W. Hatchett, Chief Judge of the Eleventh Circuit Court of Appeals, for reassignment of the case to a judicial officer whose duty station is not located within the jurisdiction of the Middle District of Florida (Signed by Chief Judge Elizabeth Kovachevich and Judge Patricia C. Fawsett) ctc (spr)....
04/07/98	21		ORDER/designation by Chief Judge Joseph W. Hatchett for services of Senior Judge Maurice B. Cohill, Jr., of the United States District Court for the Western District of Pennsylvania, in the Middle District of Florida, signed by the Chief Justice of the United States. ctc (spr).
04/07/98	22		NOTICE OF CASE REASSIGNMENT to the Honorable Judge Maurice B. Cohill, Jr., Notice to Counsel ....

(Image of Buildings)

Downtown *Orlando*

April 7, 1998

Ms. Elizabeth A. Kovachevich,
Chief District Judge, U.S. District Court
611 North Florida Avenue, Tampa, Florida 33602

Dear Judge Kovachevich:

We greatly appreciate your taking the time to meet with us on April 1, 1998, to share your ideas and concerns for the design of the new U.S. Courthouse Annex for Orlando. We found the discussion and your candor refreshing, and we look forward to working with you toward a new facility which has a "global appeal" and is user friendly. If two terms could fairly describe Orlando's downtown, those are good ones.

As you requested in our meeting, we will gladly work with GSA to any extent possible to assure a community-integrated facility design, and will be happy to explore shared solutions to your parking concerns. The best way we have found to accomplish good design is to begin with the right designers. To that end, we look forward to being included in the selection committee in an ad hoc advisory capacity and we were happy to hear that GSA's representatives and you concur. We assume this means we will have access to the submission materials as well as the decision meetings.

We also appreciate Judge Fawsett's and your clear expressions of support for cooperation with the DDB at the A-E pre-submission meeting on April 2, 1998. Some architects have already contacted us regarding what is going on in downtown Orlando and with questions about the annex's possible impacts on adjacent neighborhoods. We think that's a good sign.

Downtown Development Board
100 South Orange Avenue, North Florida, Orlando, Florida 3201
PHONE (407) 246-2555 FAX (407) 246-2848

Once again thanks for this opportunity. Please feel free to call on us for any assistance we can provide you in this project.

Sincerely,
Thomas R. Kohler
Thomas R. Kohler
Executive Director

TRK/sc
cc: Glenda E. Hood, Mayor
Derek C. Burke, DDB Chairman
Judge Patricia Fawsett, US District Court
Stacy Cowles, GSA
Michelle Price, GSA
Rick Bernhardt, Orlando City Planning

UNITED STATES DISTRICT COURT
Middle District of Florida
Room 108, Federal Courthouse
611 N. Florida Avenue
Tampa, FL 33602-4514

RECEIVED
APR 17 1998
DOWNTOWN
DEVELOPMENT
BOARD

April 13, 1998

Mr. Thomas R. Kohler, Executive Director
Downtown Development Board
100 South Orange Avenue Orlando, FL 32801
Telephone: 407-246-2555/Fax: 407-246-2848
Dear Mr. Kohler:

Thank you for your letter dated April 7, 1998, concerning the new United States Courthouse Annex planned for Orlando. I am pleased to hear that you are looking forward to being involved in this project and are willing to assist in making this project a success. If all interested parties work together in a cooperative manner, I am sure that we will build a facility of which we can all be very proud. Again thank you for your willingness to participate.
With warmest personal regards, I am
Sincerely yours,
Elizabeth A. Kovachevich
ELIZABETH A. KOVACHEVICH
Chief Judge, Middle District of Florida

EAK: RDS: sb
c: Hon. Patricia C. Fawsett, United States District Judge,
Middle District of Florida,
Hon. Glenda E. Hood, Mayor of the City of Orlando, FL
Derek C. Burke, Chairman, Downtown Development Board
Richard D. Sletten, Clerk, U.S. District Court,
Middle District of Florida,
Stacy Cowles, Project Manager,
General Services Administration,
Michelle Price, Contracting Officer Representative,
General Services Administration,
Rick Bernhardt, Orlando City Planning

The Orlando Sentinel, Friday, July 24, 1998, pp. D-1,D-7
Developer lifts secrecy on entertainment complex ☐ The mayor was encouraged by a plan to extend Church Street activities west of I-4 By **Dan Tracy** of the Sentinel Staff

The North Carolina company that bought three blocks of downtown Orlando west of Interstate 4 may be winning city support for an entertainment, office, and housing complex. Representatives of Carolina-Florida Property, Inc., met Thursday with Mayor Glenda Hood and outlined plans for holdings along West Church Street and South Hughey Avenue....Hood and her top managers have worried for months that the company might hold onto the property and not redevelop it, leaving the city with a slew of boarded-up buildings and empty lots. The complex easily would be the largest private project ever undertaken on the west side....Hood is particularly interested in Parramore because it is plagued by high unemployment and crime–despite the fact that it is little more than a block west of the prosperous Church Street Station complex of shops, bars and restaurants. The City, under Hood's direction, has been trying unsuccessfully for years to revitalize the area....

Carolina-Florida essentially wants to extend the Church Street amenities underneath Interstate 4 and into Parramore....Carolina-Florida also owns the empty block next to the federal courthouse on Hughey that was dominated by the Lamar Hotel before it was torn down in 1997. The U.S....wants the property to expand the courthouse but has been unable to agree on a price with Carolina-Florida officials. A price likely will be determined in court.

The Wall Street Journal, Florida Journal, Wed. September 2, 1998, pp. F-1, F-4, **Orlando Parcel Is a Lot of Trouble for Investors**, By Robert Johnson, *Staff Reporter* ....–ORLANDO–The idea seemed to be a sure-fire formula for real-estate success. Over the past 18 months, four North Carolina investors snapped up 15 acres in Orlando's economically depressed Parramore neighborhood, at a cost of about $25 million. The plan: to quickly sell their land to a developer or real-estate investment trust that would be responsible for funding construction at the site. But no developer has taken a bite on the parcel, which the investors have tried to stretch as a site for a $200 million to $300 million entertainment complex, featuring a movie theater, hotel, office tower, and parking garages....Now the investors–four businessmen who are former high-school football buddies from Hickory, N.C.–have closed Carolina-Florida Property, Inc.'s operations at the 28th-floor suite in Orlando's SunTrust Center, overlooking their parcel.... "We have to have a development partner to go forward," says Ed Neill, the investors' managing partner and owner of Neill Grading & Construction Co., in Hickory, N.C. "When we made the decision to invest in the property, we knew it was a great land play, but we also knew we might be land banking it for some time." Now, he says, "we could be land banking this for years and years and years."

The Orlando Sentinel, Wednesday, October 28 1998, pp. A-1, A-10, Hood: **$40 million has not helped Parramore** ☐ Orlando's mayor asked a 14-member panel to seek new ways to aid the troubled area because past efforts have failed, By **Dan Tracy** of the Sentinel Staff

Orlando Mayor Glenda Hood on Tuesday conceded that the city has failed to reclaim the Parramore district from the ravages of crime, drugs, and poverty–despite spending $40 million on the square mile area during the past 15 years. ....As one of the few Orlando neighborhoods open to blacks during many years of segregation, Parramore has been plagued by a bad mix of land uses. City zoning laws, some going back as far as the mid-1920's, allowed warehouses and bars to be built next to houses and churches....In an attempt to reverse the slide, the city has spent more than $40 million on a wide range of projects....

PROJECT MANAGEMENT PLAN
for the **U.S. Courthouse Orlando, Florida**
Project No. -NFL97002 Bldg. No. -FL 0025ZZ
Southeast Sunbelt Region-4 Atlanta, Georgia
August 23, 1999 Jill K. Shafer, Project Manager
Michelle Price, Assistant Project Manager....
U.S. Courthouse, Orlando, Florida
I. INTRODUCTION....
II. PROSPECTUS VALIDATION....
III. SCOPE STATEMENT
Ultimately the U.S. Courthouse Complex in Orlando, including the new building, the existing Federal Building/Courthouse (FB-CT) and any future construction/renovation, will be a singular judicial complex. The complex will provide a secure environment, separate public/private/secure circulation, reinforce the urban planning of the City of Orlando, emphasize the importance of the United States Courts, promote dignity of the judicial process, implement up-to-date technologies and provide protection to federal employees and citizens conducting business in the complex. The new facility will be designed to fit within the context of the existing City of Orlando, address neighborhood issues and otherwise become a welcomed member of the community. The courthouse structure will be constructed on the 3.846-acre site immediately adjacent to the existing FB-CT structure....

MEMO TRANSMITTAL

Jill K. Shafer, RA, NCARB, PMP, Project Manager, U.S. General Services Administration, S.E. Sunbelt Region, 401 West Peachtree Street–Suite 2500, Atlanta, GA 30365-2550 678 776 5824 - FAX 404 331 7696

DATE: November 8, 1999
TO: The Honorable Joel F. Dubina, United States Court of Appeals, Frank M. Johnson, Jr., Federal Building and Courthouse, 15 Lee Street, Montgomery, AL 36104
FROM: Jill K. Shafer, RA, NCARB, PMP, Project Manager
RE: United States Courthouse, Orlando, Florida

Enclosed please find for your use and information the following materials: ● Project Management Plan--dated August 23, 1999; ● 3 Separate Meeting Agendas (November 3-5, 1999) and ● The Partnering Report for the Orlando Courthouse Project. Should you have any questions, concerns or request any clarification, please do not hesitate to contact me. Jill K.

Orlando Vision and Mission Statement

We commit ourselves to work together in a spirit of cooperation, collaboration and trust while having fun in the process. We will work to create the first dedicated Federal Courthouse in Orlando, providing a symbol of justice and democracy, with state-of-the-art courts planning, security and technology, for today, and into the future. The courthouse shall make a positive contribution to the City's development, have a strong regional identity, make a statement to the world and demonstrate the wise use of public resources.

MEMO TRANSMITTAL

Jill K. Shafer, RA, NCARB, PMP, Project Manager, U.S. General Services Administration, S.E. Sunbelt Region, 401 West Peachtree Street--Suite 2500, Atlanta, GA 30365-2550 678 776 5824 - FAX 404 331 7696

DATE: November 8, 1999
TO: Ms. Sheryl Loesch, Clerk of the Court, United States District Court, Middle District of Florida, 80 North Hughey Avenue, Orlando, FL 32801
FROM: Jill K. Shafer, RA, NCARB, PMP, Project Manager
RE: United States Courthouse, Orlando, Florida

Enclosed please find for your use and information the following materials: ● Project Management Plan--dated August 23, 1999; ● 3 Separate Meeting Agendas (November 3-5, 1999) and ● The Partnering Report for the Orlando Courthouse Project. Should you have any questions, concerns or request any clarification, please do not hesitate to contact me. Jill K.
Orlando Vision and Mission Statement....

November 8, 1999

Mr. Dean J. Grandin, Jr., AICP, Planning and Development Department Director, City of Orlando,
400 South Orange Avenue, Orlando, FL 32801

Re: Orlando Courthouse Project

Dear Dean:

It was good to have the opportunity to meet you last week during the Orlando Courthouse Project Kickoff Session in Orlando. I do hope that, like me, you found the day well spent both becoming more familiar with the project but more importantly the players on the Team. Your attendance and future participation with the Project Team is important and I thank you for taking the time to spend the day with us and look forward to working with you in the future. Enclosed is a copy of the outcome of the two-day partnering event that followed the Kick-Off. I believe there is useful information there for your review and consideration.

Sincerely, Jill K. Shafer...Project Manager,

Encl. ***Vision and Mission Statement-....***

November 24, 1999

Honorable R. Lanier Anderson III
Chief Judge, United States Court of Appeals
Post Office Box 977, Macon, GA 31202-0977

Dear Chief Judge Anderson:

On behalf of the General Services Administration, the Southeast Sunbelt Region, and the Orlando project team, I want to thank you for your efforts in coordinating and facilitating our meeting on Monday, November 22, 1999. I firmly believe that the support you, Judge Dubina, Judge Evans, Judge Paul and the Administrative Office of the United States Courts demonstrated, will be instrumental in our future progress and ultimately the success of the Orlando Courthouse project. We understand that the court's team, including Circuit Judge Dubina, Chief Judge Evans and Senior Judge Paul will work closely together with our project team and further that Judge Paul will be the principal contact working with the team on a regular basis....We look forward to having the opportunity of working with you to complete this project in a cooperative and expeditious manner. Sincerely, Paul Chistolini Deputy Commissioner

MEMO Jill K. Shafer...Project Manager....
DATE: December 28, 1999
TO: Orlando Project Team—Judge Maurice A. Paul, Sheryl L. Loesch, Larry , Smith...Jack Chandler....Andrea Leers....Kenneth Austin, Thomas Kohler....
FROM: Jill K. Shafer, Project Mgr RE: Art in Architecture Process U.S. Courthouse, Orlando, Florida
Project Team:....
We anticipate that the "Kick-Off Meeting, in Orlando" will occur in late January 2000. To facilitate preparations for this meeting we first need to identify the Panel Member participants. Therefore, please forward to my attention your list of participants who will be attending. (please note that each Panel Group of representatives, Client, Designer, etc., will have one single vote for a total of seven votes)....
Jill K. Shafer, Project Manager.

● LEERS WEINZAPFEL ASSOCIATES ● (logo)
HLM Design

Project Memorandum
US Courthouse, Orlando, FL (Project) — **990236.00** (Project Number)
(Department/Description) — **5/8/00** (Date)
HLM Design Conference Room/11:00 a.m.
(Location/Time)
(Revised/Revision)

Purpose: Final blocking and stacking review meeting.
Attendees: The Hon. Elizabeth Kovachevich USDC The Hon. Anne Conway USDC Sheryl Loesch USDC Sherrill Newton USDC Larry Smith USDC Jack Chandler 11th Circuit Elaine Fenton 11th Circuit John Myers AOUSC Tom Jenkins AOUSC Jim Bishop US Probation Tom Primosch US Pretrial Services Eric Thompson USMS Bernie Williams USMS Robert Andrukonis GSA Jill Shafer GSA Martha Pollock GSA Drew Pedrick CH2M Hill Michael Zanin Vitetta Walter Hawkins City of Orlando Ken Austin Orlando DDB Richard Unger City of Orlando Sam Vennero City of Orlando Andrea Leers LWA/HLM....

Project Memorandum--990236.00 US Courthouse, Orlando, Florida Discussion--Andrea Leers opened the meeting and briefly reviewed the blocking and stacking process. A review of the potential future site development has been performed. The task is to balance the court development with the impact or development of the city.

Three key areas would be discussed during the meeting. **1**. The site within the city. **2**. The city's goals and plans. **3**. Block/stacking options.

Site Issues--1. The fabric of the downtown area was briefly reviewed including the areas adjacent to the site. **2**. It is important to create site amenities since none currently exist. **3**. The design team's goal is to build on the historic importance of Central Boulevard. The site is deemed a good one due to its centrality to the city.

City Goals--1. Parking continues to be an on-going question. There are other factors that may influence parking such as the future law school or development of neighborhoods to the west. In addition, parking may need to be provided elsewhere for jurors and the public. **2**. Concerning parking, the needs may be accomplished based on the availability of land. Sam Vennero briefly reviewed current locations of downtown parking; **a**. Parking Lot 12 and 121A are located just north of the courthouse site and are used for the state buildings and existing courthouse. **b.** Parking under I-4 is used for long and short term parking. **c**. The parking lot underneath I-4 south of Central is used primarily for the Church Street complex. **d**. The Church Street parking garage is used for city police and public parking. Retail space was added to spur growth in the area. **e**. The central parking garage east of I-4 is currently full and there is a waiting list for future parking. **f.** Most of the downtown parking areas are currently full.

3. It was noted that the potential I-4 expansion will decrease some spaces in the downtown area. This could be up to 100 spaces. **4.** There are also possibilities for a future Lymmo expansion (downtown bus loop). One option would be to expand east to the Washington area and perhaps down Hughey to Central. This is currently included in the city's 2010 plan, although there is no indication of when this may actually be implemented. **5.** Judge K expressed concern about noise from I-4 on the potential law school location (in the Lot 12 and 12A area). She noted that the District Court is not part of the law school site selection committee, however, they have offered to participate in an advisory role. **6.** A question was brought up concerning the future of the Parramore area. Ken Austin noted that it is being converted from industrial and single family zoning into residential and business zoning. The Parramore area is bounded by Parramore Street on the west to I-4 on the east and Colonial Drive on the north to South Street on the south . The city is currently looking for further development of the area. One proposed project is Church Street Square, which will be located just south of the Church Street garage. This potential development would encompass office, retail, and residential uses. **7.** It was also questioned as to what the plans are for the block just west of the site. The city responded that there are no current plans for further development of this area. There has been some discussion of swapping out warehouse buildings for future development. There is some new zoning in the works for that area and it could be changed to allow for more dense housing such as apartments. Therefore, the area could go a number of directions, but it was noted that the city cannot drive the market, but they can try to steer it.

8. Some adjacent sites are highly desirable to be reserved for future parking. Any new development in the Parramore area will need parking. Close, reasonably priced parking is desirable for courthouse use. It was noted that the Church Street garage can expand vertically. It is currently running at $40 per month, while most of the downtown garages cost $75 per month. It was also noted that any new parking

garage downtown must provide a certain percentage of spaces for public parking. **9**. Ken Austin mentioned the streetscape improvements are planned for Central Boulevard. The city would provide the actual construction of the streetscape. At this point, it does not appear that Division or Hughey would receive any street-scape treatment. It was also noted that the Mission on the south side of Central has expressed a desire to move out of that location. They have spoken with the Police Department about buying the building, but nothing has progressed. **10**. The discussion continued regarding the actual space needs for parking. Some factors to be considered regarding the spaces required are the potential loss of I-4 parking, the loss of parking with the addition of the new law school, plus the additional parking required for the new courthouse. As a result, Sam Vennero needs proposed numbers of spaces in order to analyze the impact to the downtown parking situation. It is possible that the courts could rent 200-300 spaces with an additional 100-200 for public parking. It is also important to understand if the courts would commit to the city to lease a certain number of spaces when the building is complete and Bankruptcy moves back into the existing building. **11**. It was requested that the courts work on exact parking counts for 2004 or 2005 to include both employees and visitors. The city would then analyze and consider a request for additional parking. It is possible that a meeting could occur within the next three weeks to discuss this issue further. **12.** It was also requested that the city assist with streetscaping on the south side of Central Boulevard. The city is willing to commit, but were not sure of the extent of the streetscape. The streetscape was noted to match the balance of the downtown streetscape plan. **13**. Currently the city does not own any surplus land around the site which could be utilized for parking. The city would need to purchase land and construct a parking garage which would drive the per-month charge up. It was questioned whether GSA could buy additional land and building a parking garage for the 30-year needs.....

Reported by Robert E. Egleston, AIA, Project Manager
AR-0011608
REE:LFB:je cc: Attendees

May 26, 2000
Ms. Sheryl L. Loesch, Clerk of the Court
United States District Court Middle District of Florida
80 North Hughey Avenue Orlando, FL 32801-2278
Re: U.S. Courthouse Project, Orlando, Florida
Dear Ms. Loesch:
We are in receipt of your May 25, 2000 letter and binder of color renderings. Your letter very clearly articulates many of the court's concerns and will certainly be of use to the designers and we appreciate your providing them....
In response to the overall design strategy you describe, I believe that the Team has carefully studied the issue of focus on Division Street and have moved beyond it as an option. We moved on for numerous reasons:

- Historic significance and strength of West Central Boulevard as an East/West connector to the downtown
- Recommendations by urban designers to address West Central Boulevard, and
- The City's focus on developing and upgrading West Central Boulevard, as outlined in both the Orlando City Streetscape Improvements Downtown Outlook Plan and Orlando's Plan for its Central City Neighborhoods, dated 2/28/2000.

It is important to remember that placing the focus on West Central Boulevard in no way precludes development of an attractive and appropriate face to the neighborhood west of Division Street....

Page 2 May 28 2000 Ms. Sheryl L. Loesch, Clerk of Court
....I will be providing a copy of your letter to the Leers/HLM Design Team because it captures information that will be of use to them. However, I have determined that it would be most inappropriate for me to forward the "generic concept sketches, as it is much more valuable to the design team that the courts describe their functional needs rather than provide graphic solutions.
Again, we appreciate your support and interest and look forward to the next phase of this project. Sincerely,
Jill K. Shafer, RA,NCARB, PMP
c: Chief Judge Elizabeth A. Kovachevich Judge Patricia C. Fawsett Judge Anne Conway....

May 26, 2000
Ms. Sheryl L. Loesch, Clerk of the Court
United States District Court Middle District of Florida
80 North Hughey Avenue Orlando, FL 32801-2278
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Jill K. Shafer, RA,NCARB, PMP
c: Chief Judge Elizabeth A. Kovachevich Judge Patricia C. Fawsett Judge Anne Conway....

U.S. COURTHOUSE GSA NFL97002
ORLANDO, FLORIDA LWA/HLM

DESIGN DEVELOPMENT SCHEDULING SESSION

U.S. Courthouse Orlando, Florida

INTRODUCTION

As a tool to prepare for the Design Development Phase for the project a full wall scheduling was held in the office of HLM Design on November 1, 2000. Representatives from GSA, the Courts, and the main disciplines of the design team were invited to participate....The session was facilitated by Bob Egleston, project manager for the design team. Teamwork and partnering was a main ingredient for the success of the scheduling session. At the outset all participants were encouraged to allow for a free interchange of ideas and thinking to occur. Following are the participants that attended:

- Facilitation Bob Egleston HLM Project Manager

- Owner Tom Walker GSA/Asst. Reg. Admin.
  Jill Shafer GSA/Asst. Proj. Mgr....
- Client Agencies Hon. Anne Conway, U.S. District Court
  Hon. John Antoon U.S. District Court
  Sheryl Loesch U.S. District Court/Clerk....
- Media Susan Clary Courts Reporter, Orl. Sentinel

Subsequent Comments to these Minutes

1. The Court believes that GSA should not be going forward with the design while we dispute the selection of the corner atrium which, according to the Courts, fits neither the interests of the City of Orlando nor the needs of the Court.

** END **

G L O B A L L o g o " B r i t a , Susan'<Susan.Brita@mail.house.gov> on 11/21/2000....

„„Subject: RE: GSA Orlando-November 1, 2000 Minutes

Jill-thanks for the minutes. I would iike to make one point-as an interested third party I am very surprised and find it very inappropriate that a professional reporter from a local newspaper would be included in working sessions with government employees on a government project.

United States District Court Middle District of Florida
George C. Young U.S. Courthouse & Federal Building
80 North Hughey AvenueOrlando, Florida 32801
Anne C. Conway (407) 835-4270
United States District Judge November 27, 2000

Mr. Thomas H. Walker,
Assistant Regional Administrator
Public Buildings Service
General Services Administration
401 West Peachtree Street
Atlanta, Georgia 30365

Dear Mr. Walker:

Re: Orlando Courthouse Annex

Glenda Hood, Mayor of the City of Orlando, is coordinating the meeting to discuss proposed modifications to the design of the Orlando Courthouse Annex. You asked me to write and advise you in advance of the meeting what modifications we desire. All we want is what we have been asking for since the inception of this project.

1. A building that looks like a traditional courthouse, not unlike those recently built by GSA in Tallahassee, Florida, Montgomery, Alabama, Youngstown, Ohio and numerous other cities. We want a courthouse design that is sensitive to the neighborhood; one that does not have window treatment reminiscent of bars on windows and otherwise offend our neighbors. Further, the courthouse should be designed so that it is not necessary to add a bubble to contain the special proceedings courtroom.

2. A building that is as far away from I-4 as possible. If the present design must be used with exterior modifications, it should be turned onto Division Avenue with the entrance flipped so that it is facing the George C. Young Building with a public plaza between the two buildings. As you know, Orlando has been selected as the site for the new Florida A&M law school. The law school will be immediately north of the present building on Hughey Avenue. What would be more welcoming to the A&M community than a public plaza inviting them across the street

to the courthouse? Your present plan calls for a fenced parking lot to be immediately across from the new law school. Flipping the building also makes it more accessible for those courthouse users who will remain in the George C. Young Building, such as Public Defender and U.S. Attorney personnel. The employees in the Annex would be able to more easily use facilities, such as the snack bar, which will remain in the George C. Young Building. The fenced parking lot would be across from I-4 and offensive to no one.

3. A building which does not cost the taxpayers a fortune to maintain. The four story atrium should be reduced to a two story atrium. Such a reduction would provide more usable space on the third and fourth floors, would allow the special proceedings courtroom to fit in the building, and would reduce the cost of air-conditioning unused space.

4. A building that can be designed and built with materials that are easy to maintain. The landscaping included in the Annex is a waste of money. GSA has never maintained any landscaping around the present building, nor does GSA regularly clean windows. Using glass as a primary building material is ridiculous.

5. A building that affords the utmost safety and security. ....The North Atrium, designed by Ms. Leers, and selected by the Court as the preferred concept, met most of our concerns. Inexplicably, a concept which had been rejected early on in the process was chosen over the Court's objection. Every other Court that has gone through this process was given a say in say their courthouse looked like. We are asking simply to be treated the same way. What we are asking for is not unreasonable. GSA should make the changes we have requested so that we can continue together to build a Courthouse Annex for Orlando that meets the needs of the Court and the interests of the community.

Sincerely,

Anne C. Conway
Anne C. Conway

c: Chief Judge Anderson
Chief Judge Kovachevich
The Honorable Glenda Hood

(GSA) U.S. General Services Administration Michelle
(LOGO) Southeast Sunbelt Region *Price 4pc*
DEC 01 2000 (Receipt Stamp/Clock)
(Arrow) Dec 2000 RECEIVED 4 PCA

The Honorable Judge Anne C. Conway
United States District Court Middle District of Florida
George C. Young Courthouse & Federal Building
80 North Hughey Avenue Orlando, FL 32801

Dear Judge Conway:

Thank you for your letter dated 11/27/00 regarding the Orlando Courthouse. As we discussed on November 1, 2000 we will "agree to disagree" on the exterior of the Orlando Courthouse design. However, we also agree that the General Services Administration (GSA) will not be changing the exterior design, nor will we resite the structure within the city block or go back to another concept. The designers and team, including the Courts, spent the good part of October 1999 through May 2000 in the Pre-Design phase studying these issues.

We will, however, be willing to look into the idea of a public plaza along West Washington Street. It is my understanding that the direction, from both the Courts and the United States Marshals Service, is that no public access to the interior of the site is acceptable, including the specific direction that no staff access to the rear entrance of the George C. Young facility will be provided.

This may dictate that any public plaza be along the public edge of West Washington. We are certain that, in our continuing discussions with Tom Kohler of the Downtown Development Board, they would be willing to consider implementing their "streetscape plan" for West Washington Street in coordination and cooperation with the GSA.....

401 West Peachtree Street, Atlanta, GA 30365-2550

-2-

We look forward to continuing to work with the Courts on the interior of the building and I look forward to seeing you on December 7th at the next meeting. Sincerely, *Signature*

Thomas H. Walker, P.E.,
Assistant Regional Administration Public Buildings Service
cc; Chief Judge Anderson Chief Judge Kovachevich The Honorable Glenda Hood Paul Chistolini Robert Peck.

OrlandoSentinel.com...Anger over courthouse won't die
Susan Clary of the Sentinel Staff Posted February 2, 2001-
Government builders planning a new federal courthouse in Orlando have run afoul of an alliance of unlikely architectural critics--federal judges, court workers, and even civic leaders
Orlando Sentinel: Central Florida News Page 2 of 6

The first signs of trouble appeared in the summer of 1998. After a year of interviewing potential architects, a selection committee of four GSA employees, Chief Judge Elizabeth Kovachevich and U.S. District Judge Patricia Fawsett met in New York City for a vote.

The five finalists included Andrea Leers of Leers Weinzapfel Associates in Boston and Henry Cobb of Pei Cobb Freed & Partners in New York. Kovachevich and Fawsett favored Pei Cobb, the firm of famous architect I.M. Pei....The committee voted to select Pei Cobb and disbanded.

According to Tom Walker, assistant Southeast administrator for GSA, two of the agency employees later decided to switch their votes to Leers, who had renovated several courthouses for the agency. It was a clear violation of GSA's own policy. When Fawsett and Kovachevich learned of the change a month later, both quit the committee.

A flurry of letters followed. Fawsett called the process improper and unethical, adding "The actions of the GSA may well be illegal."
Orlando Sentinel: Central Florida News Page 5 of 6

....Tom Kohler, executive director of the Downtown Development Board, and Ken Austin, an architect with the Board, said they were pleased with the way Leers responded to their request to position the building to face the neighborhood. "The quality GSA has put into their projects have been extraordinary," Kohler said. "All the new federal courthouses I have seen in the last several years have been drop-dead beautiful buildings."

Walker rejected the accusation that GSA officials have tried to bully the community into accepting the design. "The idea we go into these things showing how big and mean and strong we are is just not true," Walker said....
http://www.orlandosenbtinel.com/news/loca/orl-asec-court0020201.story

OrlandoSentinel.com...U.S. bends on courthouse
Tamara Lytle/Washington Bureau Posted June 29, 2001

WASHINGTON--The long and contentious dispute over Orlando new federal courthouse will be settled with a new design, U.S. Rep. Ric Keller said Thursday. The General Services Administration, which has been loath to change its glass-dominated design, acknowledged Thursday that it has agreed to accommodate area judges, law enforcement and other Orlando officials who hated the old proposal...."We were concerned in this courthouse about creating an inviting target," said U.S. District Judge Elizabeth Kovachevich, the top federal judge in Central Florida....

"We have bullet holes in the existing Orlando courthouse," she said. The building will replace the existing George C. Young Courthouse next door....Orlando Mayor Glenda Hood said the courthouse is important to the development of Parramore, a long-distressed portion of downtown. "The old design did not create an inviting connection to the FAMU law school and other parts of the neighborhood, she said. "They all have to work together."....
http://www.orlandosentinel.com/news/orl-loc-orcourthouse062901.story

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Orlando Sentinel OrlandoSentinel.com, FRIDAY, FEBRUARY 14, 2003, SECTION E House moves Orlando's new federal courthouse a step closer to reality By DAVID DAMRON, SENTINEL STAFF WRITER.

After a fight over architecture delayed the project for a year, Congress appears ready to approve $79.2 million to build a new federal courthouse in downtown Orlando. The House on Thursday approved the $397 billion spending bill that contains the courthouse funding. The Senate was expected to consider the bill today, and President Bush has said he'll approve the plan.

The courthouse project was a last-minute addition. On a copy of the bill that House members reviewed, a hand-written "Orlando, United States Courthouse, $79,261,000" was squeezed in between lines of other projects in the printed budget plan. "If this comes about, it's just a lesson in never giving up," U.S. District Judge Patricia Fawsett said. "And boy, do we need this."

(City Seal) **CITY OF ORLANDO** *March 31, 2003*

To: Gabe Kaimowitz: On 3-13-03, you requested via e-mail 8 letters under the category of "Correspondence with Judge Conway.[11]" My staff immediately looked for the requested documents in Mayor Hood's correspondence boxes which I had already provided to you in an earlier request....Since the items were not in Mayor Hood's correspondence files, I asked other City departments who might have filed on the federal courthouse project to check their files for the 8 items. I provided you with a copy of the 11/27/000 letter on Friday March 28th as well as 2 other letters that were part of your initial request of 42 items.

Amy Iennaco,

Asst. City Attorney

---

[11] *--The letters identified in Mayor Glenda Hood's mail log, included the following relevant entries on Mail Log Sheets by date:*

DATE: Nov. 2, 2000--NAME and (Address or Company) Ann C. Conway, Judge, U.S. District Court, US Clerk, Office of the Clerk, United States Courthouse, 80 North Hughey Avenue, Orlando, FL 32801 TO: General Services Administration: COMMENTS: Concern about design of proposed Orlando Federal Courthouse, ROUTED TO: (Date): FW: F. Kittinger

DATE: November 28, 2000--NAME and (Address or Company) Ann C. Conway, Judge To: Thomas H. Walker Cc. Mayor Hood COMMENTS: Letter that advises the GSA of modifications desired for the Orlando Courthouse Annex. ROUTED TO: (Date); FW: F. Kittinger

DATE: December 8, 2000--Thomas H. Walker to: Judge Anne C. Conway, cc: Mayor Hood , COMMENTS: Response to previous concerns about the design of the Orlando Courthouse.

DATE: December 13, 2000--Glenda E. Hood to: Mel Martinez, Orange County Chairman, Orange County Administration Center, 400 E. South Street, 5th Floor, Orlando, FL 32803: COMMENTS: Re: school capacity policy effect on efficient urban form, infill and downtown housing.

DATE: January 2, 2001--Anne C. Conway To: Mel Martinez cc; Mayor Hood COMMENTS: Letter seeking support for new design of federal courthouse.

DATE: January 11, 2001--Anne C. Conway To: Honorable Bob Graham, cc: Mayor Hood COMMENTS: Concern about the design of the new Federal Courthouse. ROUTED TO: (Date); FW: F. Kittinger

DATE: February 1, 2001--Parramore Heritage Renovation Foundation, Inc. 397 West Church Street, Orlando, FL 32801-2512 COMMENTS: Resolution to clarify the Foundation's position on the new Federal Courthouse.

DATE: MAY 4, 2001--Judge Anne C. Conway United States District Court COMMENTS: Notice of the Court's compromise proposal for the Orlando federal courthouse. FW: D. Turner

GSA ***GSA Southeast Sunbelt Region***

MAY 02 2003

Mr. Gabe Kaimowitz, Esq., Florida Representative
Attorneys Against American Apartheid
4411 SW 34th Street, Suit 1305,
Gainesville, FL 32608-7544

Dear Mr. Kaimowitz:

Thank you for your March 26, 2003, Freedom of Information Act (FOIA) request for a copy of documents furnished by the owner of the perspective design team and others at the beginning of the project, relative to Contract No. GS-04P-98-EXC-0021, Orlando, FL

Enclosed is a copy of the documents that we have been able to collect as of this date. We are providing you with this preliminary copy of documents, as we understand you have a pressing need to receive this information.

Based on our telephone conversation earlier in the week, you stated that you were interested in receiving documents with the following names in the body or a carbon copy:

1. Thomas Kohler, Director, City of Orlando, FL Community Redevelopment Agency (also known as the"Downtown Development Board.")

2. Glenda Hood

3. Paramor Heritag[1] *Initially, Item 6 was too broad in scope for us to identify by specific documents that would satisfy your request. However, you clarified by telephone that this should be specific to the Orlando project.*

Based on the clarification you provided in our telephone conversation, we conducted a second review of available files and found that there is still a vast amount of documents that correspond to your request....

U.S. General Services Administration
77 Forsyth Street, SW
Atlanta, GA 30303-3427....
Sincerely, Mildred W. Quinley
Freedom of Information Act Officer

Enclosures

[1] --Correct spelling is Parramore Heritage.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0061

William. K. Suter
Clerk of the Court
(202) 479-3011

January 23, 2004

Mr. Gabriel Kaimowitz
P.O. Box 140119
Gainesville, FL 32614

Re: Gabe Kaimowitz
v. Orlando
Application No. 03A621

Dear Mr. Kaimowitz:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kennedy, who on January 23, 20004, extended the time to and including March 4, 2004.

This letter has been sent to those designated on the attached notification list.

Sincerely,

***William K. Suter**, Clerk*
by GBJ
Gail B. Johnson
Case Analyst

(2)

Supreme Court, U.S.
FILED
APR - 9 2004
OFFICE OF THE CLERK

No. 03-1267

IN THE

Supreme Court of the United States

GABE KAIMOWITZ,

Petitioner,

vs.

ORLANDO, FL., RICK BERNHARDT, and ORLANDO NEIGHBORHOOD IMPROVEMENT CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

Bobby G. Palmer, Jr.
Hilyard, Bogan & Palmer, P.A.
P. O. Box 4973
Orlando, FL 32802-4973
(407) 425-4251
Attorneys for Respondents, Orlando, Florida and Rick Bernhardt

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER RULE 60(b), FEDERAL RULES OF CIVIL PROCEDURE CAN PROVIDE THE PETITIONER WITH RELIEF FROM A VALID JUDGMENT FOR ATTORNEY'S FEES ENTERED MORE THAN THREE YEARS AGO, ASSUMING THE PETITIONER'S PETITION FOR WRIT OF CERTIORARI WAS TIMELY.

II. WHETHER PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED BY A VALID JUDGMENT ENTERED AGAINST HIM FOR ATTORNEY'S FEES MORE THAN THREE YEARS AGO, ASSUMING THE PETITIONER'S PETITION FOR WRIT OF CERTIORARI WAS TIMELY.

III. WHETHER THIS IS AN APPROPRIATE CASE FOR THE IMPOSITION OF MONETARY SANCTIONS AGAINST THE PETITIONER UNDER RULE 42.2.

PARTIES

The caption of this brief reflects all parties to the proceedings in the Court which rendered the judgment sought to be reviewed; however, the undersigned counsel appears only for the Respondents, Orlando, Florida and Rick Bernhardt.

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CITATIONS OF UNOFFICIAL REPORTS OF ORDERS ENTERED

All relevant orders entered from Courts below were unreported. Relevant orders appear within the Petitioner's Appendix. References are made in this brief to judgments and orders appearing within the Petitioner's Appendix.

STATEMENT OF THE BASIS FOR JURISDICTION

The merits of this appeal are utterly frivolous, as were most of the efforts of the Petitioner, Gabe Kaimowitz (hereinafter referred to as the "Petitioner"), in both the U.S. District Court for the Middle District of Florida and the U.S. Court of Appeals for the Eleventh Circuit. The Petitioner has failed in this appeal to establish any compelling grounds to grant his Petition for Writ of Certiorari. In fact, the Petition for Writ of Certiorari fails to even mention Rule 10, Rules of the Supreme Court of the United States, which provides guidance as to the compelling grounds this Court generally considers when granting certiorari. See generally Haitian Refugee Center, Inc. v. Baker, 502 U.S. 1122, 112 S. Ct. 1245, 117 L.Ed.2d 477 (1992).

Pursuant to Rule 10, Rules of the Supreme Court of the United States, review by this Court on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted by this Court only for compelling reasons. In granting a petition for writ of certiorari, this Court usually considers whether a U.S. Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter; whether a U.S. Court of Appeals has decided an important federal question in a way that conflicts with the decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial

proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. Rule 10, Rules of the Supreme Court of the United States.

Notwithstanding the fact that the Petitioner has failed to establish any of the considerations governing review on certiorari found in Rule 10, Rules of the Supreme Court of the United States, the Petitioner's Petition for Writ of Certiorari is an untimely attempt to circumvent Rule 13, Rules of the Supreme Court of the United States, which mandates that a petition for writ of certiorari to review a "judgment" in any case, civil or criminal, entered by a United States Court of Appeals, is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment. See County of Sonoma, et al. v. Isbell, et al., 439 U.S. 996, 99 S. Ct. 597, 58 L. Ed. 2d 669 (1978) (petition for certiorari was jurisdictionally untimely); Sunset Scavenger Company, et al. v. William Roberts, et al., 434 U.S. 877, 98 S. Ct. 229, 54 L. Ed. 2d 156 (1977) (petition for writ of certiorari denied as untimely); Fogg, et al. v. Welcome, 432 U.S. 911, 97 S. Ct. 2960, 53 L. Ed. 2d 1084 (1977) (petition for writ of certiorari denied as untimely filed); Forrow v. Estelle, 419 U.S. 1013, 95 S. Ct. 333, 42 L. Ed. 2d 287 (1974) (petition for writ of certiorari denied as untimely.)

Essentially, the Petitioner bravely asserts that his Petition for Writ of Certiorari is timely because it was filed with this Court within 90 days of the dismissal on November 6, 2003, of an appeal deemed to be frivolous by the U.S. Court of Appeals for the Eleventh Circuit. That appeal was from an Order dated July 23, 2003, denying as "untimely" a Rule 60(b) motion filed with the U.S. District Court for the Middle District of Florida, Orlando Division, substantially

more than one year from the dates of entry of judgments to which the Rule 60(b) motion was directed, namely, a summary judgment entered against Petitioner on November 26, 1999, and a $20,000 judgment entered against Petitioner on January 25, 2001, for attorney's fees. The Petition for Writ of Certiorari is an unclever, obvious stalling device to avoid the finality of judgments entered long ago against the Petitioner, especially the $20,000 judgment entered against him on January 25, 2001, which remains unsatisfied. The frivolousness of this appeal is commensurate with the Petitioner's tenacious pursuit of a frivolous and vexatious lawsuit filed against the Respondents in the absence of any evidence. This appeal should be dismissed for want of jurisdiction.

STATUTES AND RULES INVOLVED

28 U.S.C. §455(a) states in pertinent part: "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

31 U.S.C. §3729(a)(1) states in pertinent part: "Liability for certain acts. -- Any person who (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval; ... is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, ..."

31 U.S.C. §3730(b) states in pertinent part: "Actions by private persons.-- (1) A person may bring a civil action for a violation of section 3729 for the person and for the

United States Government. The actions shall be brought in the name of the Government..."

31 U.S.C. §3730(d)(4), states: "If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorney's fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious or brought primarily for purposes of harassment."

Rule 60(b), Federal Rules of Civil Procedure, states in pertinent part: "Mistakes; Inadvertence; Excusable; Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have perspective application; or (6) any other reason justifying relief from the operation of the judgment..."

Rule 13.1, Rules of the Supreme Court of the United States, states in pertinent part: "Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is

timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment..."

Rule 42.2, Rules of the Supreme Court of the United States, states: "When a petition for writ of certiorari, an appeal, or an application for other relief is frivolous, the Court may award the respondent or appellee just damages, and single or double costs under Rule 43. Damages or costs may be awarded against the petitioner, appellant, or applicant, against the party's counsel, or against both party and counsel."

STATEMENT OF THE CASE

This long and protracted litigation commenced with the Petitioner filing a qui tam action against Orlando, Florida and Rick Bernhardt (hereinafter referred to as the "Respondents"), as well as the Orlando Neighborhood Improvement Corporation, alleging violations under the False Claims Act, 31 U.S.C. §3729-3733. (p.3-a, Petitioner's App.) The Petitioner's complaint alleged that the Respondents had made claims violative of federal law to induce Community Block Grant Development ("C.D.B.G.") funds and other grants and loans from the U.S. Department of Housing and Urban Development ("H.U.D."). (p. 8-a, Petitioner's App.) The Petitioner's complaint also sought "injunctive relief to bar use of such funds for maintenance and expansion of a commercial district, low-income public housing, and alleged rehabilitation of multi-family low-income rental units in virtually all black neighborhoods of Orlando." (p. 8-a, Petitioner's App.) Over the course of the proceedings in the district court, the Petitioner filed thousands of pages of documents, deposition transcripts, affidavits, newspaper articles, collages, and other paper, much of which was repetitive, and most of which was completely irrelevant to the list of False Claims alleged by

the Petitioner. (p.23-a, Petitioner's App.) In light of the voluminous documentation submitted by the Petitioner in the district court, the Petitioner left no stone unturned in his search for false or fraudulent claims. However, despite voluminous filings, and what the U.S. District Court for the Middle District of Florida, Orlando Division, described as an "expensive and unfruitful fishing expedition", the Petitioner failed to present any evidence which demonstrated that any of the Respondents knowingly made a false or fraudulent claim to the federal government in violation of the False Claims Act. (p. 24-a, Petitioner's App.)

All of the Respondents moved for summary judgment. The U.S. District Court for the Middle District of Florida eventually entered summary judgments in favor of the Respondents and against the Petitioner in this qui tam action on November 25, 1996. (p. 18-a, Petitioner's App.) Summary judgments were entered in favor of the Respondents because the Respondents had presented evidence in the district court which demonstrated that they had taken all reasonable efforts, including, internal and external audits, to ensure substantial compliance with all applicable federal laws relating to all federal funding for all projects. Based on the frivolousness of the qui tam action, the Respondents requested attorney's fees and costs under 31. U.S.C. §3730(d)(4). (p. 36-a, Petitioner's App.) Thereafter, the Petitioner began an appellate process which can only be described as tenacious.

Eventually, on February 17, 1999, the U.S. Court of Appeals for the Eleventh Circuit granted the Respondents' motions for attorney's fees as to entitlement and remanded the matter to the U.S. District Court for the Middle District of Florida, Orlando Division, for a hearing to determine the reasonable amount of attorney's fees to be awarded after finding that the case was clearly frivolous and vexatious for

the purpose of awarding appellate fees. (p. 36-a, Petitioner's App.) After hearings on the issue of attorney's fees were held, U.S. Magistrate Judge David A. Baker of the U.S. District Court for the Middle District of Florida, Orlando Division, recommended that the Respondents be awarded attorney's fees of $20,000. (p. 46-a, Petitioner's App.) U.S. District Judge Patricia C. Fawsett of the U.S. District Court for the Middle District of Florida, Orlando Division, approved the aforementioned recommendation and on January 25, 2001, judgment was entered in favor of the Respondents and against the Petitioner in the amount of $20,000. (p. 46-a, Petitioner's App.) Undeterred, the Petitioner appealed that judgment, as well as a denial of his motion to recuse the district judge under 28 U.S.C. §455. On February 14, 2002, the U.S. Court of Appeals for the Eleventh Circuit affirmed the award of $20,000 in attorney's fees in favor of the Respondents by the U.S. District Court for the Middle District of Florida, Orlando Division. (p. 59-a, Petitioner's App.) The United States Court of Appeals for the Eleventh Circuit also affirmed the denial of the Petitioner's motion to recuse the district court judge under 31 U.S.C. §3729-3733.

Not one to suffer defeat lightly, on June 13, 2003, the Petitioner filed his Motion/Memo of Law to Set Aside Judgments Obtained By Fraud, Misrepresentation with the U.S. District Court for the Middle District of Florida, Orlando Division, which alleged conspiratorial judicial misconduct in relation to a newly proposed federal courthouse in Orlando. (p. 3-a, Petitioner's App.) The Petitioner's Motion/Memo of Law To Set Aside Judgments Obtained By Fraud, Misrepresentation was filed by the Petitioner pursuant to Rule 60(b), Federal Rules of Civil Procedure. In its Order dated July 23, 2003, the U.S. District Court for the Middle District of Florida, Orlando Division, denied the Petitioner's Motion/Memo of Law To Set Aside

Judgments Obtained By Fraud, Misrepresentation as *untimely* since the orders to which the motion was directed were entered substantially more than one year prior to the filing of the Petitioner's Motion/Memo of Law to Set Aside Judgments Obtained by Fraud, Misrepresentation. (p. 3-a, Petitioner's App.) In the same July 23, 2003, Order, the U.S. District Court for the Middle District of Florida, Orlando Division, stated as to the Petitioner's allegations:

> "In support of his motion, he has made repeated allegations of conspiratorial judicial misconduct in relation to a newly proposed federal courthouse in Orlando. These vague allegations are not only leveled against district judges in Orlando, but are also directed against judges on the Eleventh Circuit Court of Appeals. Judges of this court, as well as the Eleventh Circuit, previously addressed these allegations, and it is not necessary to address them again, because Qui Tam Plaintiff's motion is untimely."

From that Order, the Petitioner appealed to the U.S. Court of Appeals for the Eleventh Circuit. On November 6, 2003, the U.S. Court of Appeals for the Eleventh Circuit dismissed that appeal as "frivolous." (p. 1-a, Petitioner's App.) It is from that dismissal by the U.S. Court of Appeals for the Eleventh Circuit, that the Petitioner claims that this Petition for Writ of Certiorari is timely with this Court.

ARGUMENT

I. RULE 60(b), FEDERAL RULES OF CIVIL PROCEDURE DOES NOT PROVIDE THE PETITIONER WITH RELIEF FROM A VALID JUDGMENT FOR ATTORNEY'S FEES ENTERED MORE THAN THREE YEARS AGO, ASSUMING ARGUENDO THAT THE PETITIONER'S PETITION FOR WRIT OF CERTIORARI WAS TIMELY

Rule 60(b), Federal Rules of Civil Procedure provides, in pertinent part, that a court may relieve a party:

> from a final judgment, order, or proceeding for the following reasons...(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party...The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

Since the Petitioner's Motion/Memo Of Law To Set Aside Judgment(s) Obtained By Fraud, Misrepresentation originally filed with the U.S. District Court for the Middle District of Florida, Orlando Division, was brought more than one (1) year after the judgments in question were entered, relief could not be provided under Rule 60(b)(3), Federal Rules of Civil Procedure to the Petitioner.

Even if the Petitioner's Motion/Memo Of Law To Set Aside Judgment(s) Obtained By Fraud, Misrepresentation could have been maintained under Rule 60(b)(3), Federal Rules of Civil Procedure, the clear and convincing standard of proof governs. Booker v. Dugger, 825 F.2d 281, 284 (11th Cir. 1987) (quoting Montgomery v. Hall, 592 F.2d 278 (5th Cir. 1979)). It is clear that the policy of finality of judgments requires the same, if not more stringent, standards be applied to independent actions alleging fraud on the court which are brought after the one (1) year time limit has run. See Booker, supra. at p.284; see also Johnson Waste Materials v. Marshall, 611 F.2d 593, 600 (5th Cir. 1980); Rozier v. Ford Motor Company, 573 F.2d 1332 (5th Cir. 1978). "[C]onclusory averments of the existence of fraud made on information and belief and unaccompanied by a statement of clear and convincing probative facts which support such belief do not serve to raise the issue of the existence of fraud [under Rule 60(b)]." Booker, supra. at pp.283-284; see also Di Vito v. Fidelity & Deposit Company of Maryland, 361 F.2d 936, 939 (7th Cir. 1966).

Assuming arguendo that the Petitioners' Motion/Memo Of Law To Set Aside Judgment(s) Obtained By Fraud, Misrepresentation was an attempt to maintain an independent action within the meaning of the savings clause of Rule 60(b), Federal Rules of Civil Procedure, the elements for an independent action were not shown by the Petitioner.

The United States Court of Appeals for the Eleventh Circuit has held that the elements of an independent action under Rule 60(b) are:

> (1) a judgment which ought not, in equity and good conscience, be enforced; (2) a

> good defense to the alleged cause of action in which the judgment is founded; (3) fraud, accident, or mistake prevented the defendant in the judgment from obtaining the benefit of his defense; (4) the absence of fraud or negligence on the part of the defendant; and (5) the absence of any adequate remedy at law.

Securities and Exchange Commission v. E.S.M. Group, Inc., et al., 835 F.2d 270, 272-273 (11th Cir. 1988); see also Bankers Mortgage Company v. United States, 453 F.2d 73, 79 (5th Cir. 1970), cert. denied 399 U.S. 927, 90 S. Ct. 2242, 26 L. Ed. 2d 793 (1970) (quoting National Surety Company v. State Bank, 120 F. 593, 599 (8th Cir. 1903)).

In the case at bar, the Petitioner could not establish the elements necessary to maintain an independent action under Rule 60(b). The fraud which the Petitioner asserted tainted the outcome of the judgments in question had nothing to do with the Respondents' entitlement to summary judgment and entitlement to attorney's fees. In fact, the Petitioner had no good defense to the Respondents' motion for summary judgment or motion for attorney's fees despite voluminous filings in what appeared to be an expensive and unfruitful fishing expedition. The Petitioner failed to present any evidence to the district court which demonstrated that any defendant knowingly made a false or fraudulent claim to the federal government in violation of the False Claims Act. Since there were no material issues of fact presented regarding the knowledge of the Respondents of any false claims, or any false claims being filed, the motions for summary judgment of the Respondents were properly

granted by the district court and the subsequent entry of a judgment for attorney's fees against the Petitioner was completely proper. For fraud to lay a foundation for an independent action under Rule 60(b), Federal Rules of Civil Procedure, it must be such that is was not an issue in the former action, nor could it have been put in issue by the reasonable diligence of the opposing party. See The Travelers Indemnity Company v. Gore, et al., 761 F.2d 1549, 1552 (11th Cir. 1985); see also Toledo Scale Company v. Computing Scale Company, 261 U.S. 399, 425, 43 S. Ct. 458, 465, 67 L. Ed. 719 (1923).

The Petitioner could not use an independent action under Rule 60(b) as a vehicle for the relitigation of issues. "Courts have consistently held that a party is precluded by res judicata from relitigation in the independent equitable action issues that were open to litigation in the former action where he had a fair opportunity to make his claim or defense in that action." Bankers Mortgage Company v. United States, 453 F.2d 73, 79 (5th Cir. 1970); see also The Travelers Indemnity Company, supra at p. 1552. The record below is replete with repeated allegations by the Petitioner of conspiratorial judicial misconduct in relation to a newly proposed federal courthouse in Orlando. These vague allegations were not only leveled against district judges in Orlando, but were also directed against judges with the U.S. Court of Appeals for the Eleventh Circuit. District judges with the U.S. District Court for the Middle District of Florida, as well as judges with the U.S. Court of Appeals for the Eleventh Circuit addressed these frivolous conspiratorial judicial misconduct allegations in the proceedings below.

Notwithstanding the fact that Rule 60, Federal Rules of Civil Procedure could not provide the Petitioner with any relief, this appeal is yet another vehicle for the Petitioner to again allege conspiratorial judicial misconduct associated

with a new federal courthouse in Orlando. The Petitioner's vague, unsupported conspiracy theories involving federal judges did not rise to a level that required disqualification under 28 U.S.C. §455 for purposes of awarding attorney's fees against the Petitioner after his unsuccessful pursuit of a frivolous lawsuit. Although the purpose of Rule 455(a) is the promotion of public faith in the integrity of the judicial process, a second aim of the recusal statute is to ensure that a judge does not recuse herself on "unsupported, irrational or highly tenuous speculation." See Liljeberg v. Health Services Acquisition Corporation, 46 U.S. 847, 859-60, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988); United States v. Greenough, 782 F. 2d 1556, 1558 (11th Cir. 1986).

The standard for recusal under §455(a) is "whether an objective, disinterested, lay observer fully informed by the facts underlying the grounds on which recusal was sought would entertain significant doubt about the judge's impartiality." United States v. Torkington, 874 F. 2d 1441, 1446 (11th Cir. 1989) (quoting Parker v. Connors Steel Company, 855 F. 2d 1510, 1524 (11th Cir. 1988)). It is well settled that a federal judge has "an affirmative duty" not to disqualify himself or herself unnecessarily. National Autobrokers Corporation v. General Motors Corporation, 572 F. 2d 953, 958 (2d Cir. 1978); Rosen v. Sugarman, 557 F. 2d 794, 797-98 (2d Cir. 1966), cert. denied, 439 U.S. 1072, 99 S. Ct. 844, 59 L. Ed. 2d 38 (1979); Levitt v. University of Texas, 847 F. 2d 221 (5th Cir. 1988) (denying motion to disqualify based upon the plaintiff's conclusory allegations that the judge "received *ex parte* communications about the case either through his wife or from Dr. Sawyer"); see also Phillips v. Joint Legislative Comm., 637 F. 2d 1014 (5th Cir. Unit A 1981) ("[S]ection 455 does not require the judge to accept all allegations by the moving party as true.").

The district judge, as well as judges of the U.S. Court of Appeals for the Eleventh Circuit were not disqualified by the standard for recusal under §455(a) from deciding issues associated with judgments entered against the Petitioner because of their knowledge of a new federal courthouse in Orlando, which has not even been built yet. The Petitioner's unrelentless claims that the impartiality of federal judges was compromised in this case because of their knowledge of a new federal courthouse in Orlando, is utterly frivolous especially coming from an attorney.

II. THE PETITIONER'S DUE PROCESS RIGHTS WERE NOT VIOLATED BY A VALID JUDGMENT ENTERED AGAINST HIM FOR ATTORNEY'S FEES MORE THAN THREE YEARS AGO, ASSUMING ARGUENDO THAT THE PETITIONER'S PETITION FOR WRIT OF CERTIORARI WAS TIMELY

The Petitioner's claim that his due process rights were violated because he did not have a meaningful opportunity to be heard regarding the Respondents' entitlement to attorney's fees, coming from an attorney, is so utterly frivolous as to not warrant any discussion. However, it should be noted that with regard to the Petitioner's opportunity to be heard by the district court on the issue of attorney's fees, the Petitioner's own Petition for Writ of Certiorari admits at page 12 that the "magistrate held more than ten hours of hearings on the amount of fees owed to Orlando and Bernhardt on September 1, and October 27, 2000." The extended proceedings associated with this case make it clear that no one has denied Petitioner his day in court. Clearly, the Petitioner's voluminous filings with the U.S. Court of Appeals for the Eleventh Circuit further demonstrate that the Petitioner had more than an ample opportunity to be heard on all of the issues he has raised in this qui tam action. The

Petitioner's distorted framing of the Due Process Clause illuminates the frivolousness of this entire appeal.

III. THIS IS AN APPROPRIATE CASE FOR THE IMPOSITION OF MONETARY SANCTIONS AGAINST THE PETITIONER UNDER RULE 42.2

The Petitioner, an attorney licensed by The Florida Bar, has demonstrated a contempt for the federal courts and our system of justice by raising patently frivolous claims. As a result of the Petitioner's endless efforts to keep this case alive, the Respondents have been denied their right to put an end to this tedious and expensive litigation. In light of the frivolousness of this appeal, as well as the Petitioner's status as a member to The Florida Bar, this appeal is especially suited for the imposition of monetary sanctions under Rule 42.2, Rules of the Supreme Court of the United States. Rule 42.2 provides that "[w]hen an appeal or petition for writ of certiorari is frivolous, the Court may award the appellee or the respondent appropriate damages."

Clearly, this is an appropriate case for monetary sanctions. See Clark v. Florida, 475 U.S. 1134, 106 S. Ct. 1784, 90 L. Ed. 2d 330 (1986) ("The merits of this appeal are utterly frivolous, as were most of appellant's persistent efforts in the courts of Florida...This claim, coming from an attorney, is so utterly frivolous so as to not warrant any further discussion. All this suggests is that appellant considers the judicial system a laboratory where small boys can play."). Monetary sanctions under Rule 42.2 should be awarded against Petitioner in favor of the Respondents based on the frivolousness of this appeal.

CONCLUSION

Based on the foregoing authority, certiorari should be denied. Respectfully, this Court should put an end to this tedious and frivolous litigation and consider the imposition of monetary sanctions against the Petitioner pursuant to Rule 42.2, Rules of the Supreme Court of the United States.

Respectfully submitted,

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(3)

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No. 03-1267

IN THE

Supreme Court of the United States

GABE KAIMOWITZ,

Petitioner,

v.

ORLANDO, FL; RICK BERNHARDT, and ORLANDO NEIGHBORHOOD IMPROVEMENT CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

INTRODUCTION

In September 1981, while this Court was in recess, attorneys for New York City, Petitioner here and two co-counsel appeared before Justice Thurgood Marshall. Petitioner asked him to consider that day's front page tabloid newspaper announcements of postponement of a mayoral primary, as a basis for denying relief to the City. A three-judge court below had ordered the postponement, because New York failed to comply with a statutory requirement.

The City filed an emergency petition to stay the lower court decision, and have the election go forward on schedule. Petitioner argued such a ruling would confuse voters with new headlines and cause many to stay away.

Justice Marshall contacted all other members except the Chief Justice who was unavailable. Those voting unanimously denied the City's petition, *Koch v. Herron*, 453 U.S. 946 (1981). In support of this petition, Petitioner asks this Court to consider several articles, in *The Orlando Sentinel* this month. Full articles cited below may be found at: http://www.orlandosentinel.com/ through its archives. Earlier news reports are contained in the Appendix with the petition. See, e.g., Appendix, pp. 91-a; 96-a, 97-a, 111-a, 112-a, hereafter by page number only.

No exception was taken to the news reports, in the only response filed for some–but not all–of the Respondents, (hence Orlando Brief here) despite a claim to the contrary on the cover. No response has been filed for the Orlando Neighborhood Improvement Corp., though one of two questions presented concerns that enterprise.

That cover is only the tip of the iceberg of misleading information about issues, facts, and applicable law in the Orlando Brief by Orlando's counsel here. See discussion, *infra*. He took over representation for Orlando in the ninth year of this litigation, in November 2002, and responded only sporadically–e.g., he filed no response after Petitioner fleshed out for the district judge the bases for the allegations cited in the Orlando Brief, p. 8 (see relevant Order, p. 5-a).

The Orlando Brief, pp. 5-6, does echo judicial findings that no Respondent knowingly made a false claim to the United States in violation of the False Claims Act. The news reports illustrate why only such a glittering generality could cover the millions lost by U.S. taxpayers. Orlando was never tried seriously to recover them, because funds wasted were issued from the U.S. treasury based on false claims. The false claims were laid out precisely in the complaint. They were provided in each record excerpt on appeal thereafter, 1995-2002. The news reports flesh out one.

"C. Orlando has certified falsely that it is in full compliance with HUD (U.S. Department of Housing and Urban Development) regulations and guidelines, though it has not kept, or refused in 1993 to reveal ...the documentation for grants received from HUD for its rental rehabilitation programs....The City is required to do (so) upon appropriate demand, 24 C.F.R. §12.14(c)(2). See also Sub-part C– Disclosure by Applicants, 24 C.F.R. §12.30, et seq

i. A bare-bones list of sub-recipients of all such multi-family rental rehabilitation (RPP) loans was given to the Qui Tam Plaintiff in June 1993, without RPP amounts. A list of those amounts was obtained by him from Stella Lewis, in her private capacity. She is a member of the Orlando Board of Zoning Adjustment.

ii. Lewis determined that a "slumlord" Philip Cowherd has received $311,735 of the $1,081,569 distributed for RPP purposes between 1985 and 1993. He got assistance for 19 of the 74 rental rehab projects funded in that period of time.

iii. In 1993, Cowherd was reported to own more than 20 multi-family rental facilities in the 99% African-American Holden-Parramore neighborhood.

iv. In 1993, Cowherd served Orlando as the lone white private citizen who appeared for a photo opportunity with other members appointed by the City to a rump board chosen by Orlando to develop Parramore Heritage Renovation Project ("PHRP.").

v. In 1993, Cowherd also served on an advisory committee considering CDBG grants for the PHRP and other projects."

Complaint, *supra*, at p. 6.

"Orlando Mayor Buddy Dyer wants a dozen Parramore landlords to repay $318,617 the city loaned them more than 10 years ago to help renovate their rental property....Already, the city has lost out on $267,597, in similar loans after failing to collect before the five-year statute of limitations lapsed....The city began the program in 1985 and gave out 73 no-interest, 10-year loans through 1993. The money came through the U.S. Department of Housing and Urban Development....Phil Cowherd, who with 11 loans received more than any other property owner, hasn't paid back any of them. He's off the hook for six of them, worth $90,880, because the statute of limitations ran out. Now the city hopes to get the $43,772, owed for the remaining five. Cowherd, who campaigned against Dyer's re-election last month...questioned the timing of the move. He says he, too, was told the city would never enforce payment."

B. Kassab, "Old loans close in on landlords,"
The Orlando Sentinel, Apr. 6, 2004, pp. B-1, B-4.

"Parramore landlords who received renovations loans from Orlando deserve no sympathy now that the city is demanding repayment....In the past, Orlando officials have been lax in enforcing the repayment terms in various programs designed to help small businesses. That explains how the city allowed the statute of limitations to elapse on $267,000 in similar renovation loans....The city's credibility depends on enforcing the terms of its contracts."

Editorial, "A contract is a contract,"
The Orlando Sentinel, Apr. 12, 2004, p. A-13.

Such reports serve to illustrate the harm done (1) in fact and (2) to the appearance of justice, when the U.S. Court of Appeals for the 11th Circuit looked the other way, while Judge Patricia C. Fawsett absolved Respondents of any wrongdoing, 1995-2002. Why did she do so?

> "Shovels hit dirt Monday to kick off construction of Orlando's new $86 million federal courthouse. The 10 a.m. ceremony ended 12 years of planning, gentle arm-twisting and begging by Middle District of Florida Chief Judge Patricia C. Fawsett and other judges and federal employees....The addition comes years after it was first requested to keep pace with Central Florida's population boom and the rise in criminal and civil cases that followed. Congress approved $79 million for the project in 2002 and another $7.2 million in 2003.....This year (the court) will handle 8,000 cases, Fawsett said in her address. Among the speakers were Orlando Mayor Buddy Dyer and City Commissioner Daisy Lynum, who said the complex–including the Florida A&M University College of Law being built next door–would complement ongoing revitalization of the Parramore district."
>
> H. P. Curtis, "Officials launch new courthouse," *The Orlando Sentinel*, Apr. 6, 2004, p. B4.

Not reported were the *ex parte* communications with Defendant Richard Bernhardt, Tom Kohler, etc., for Orlando by Judge Fawsett and other jurists. See pp. 94-a through 112-a. Judges shared a common goal with Defendants, to create appropriate surroundings and structure in a poor black area for the courthouse complex. So Judge Fawsett found no merit in any paper for the plaintiffs, no matter what it included. She did not allow them a hearing.

With several Eleventh Circuit judges also involved in those *ex parte* communications, that appeals court sanctioned a departure from the accepted and usual course of judicial proceedings, so as to call for an exercise of this Court's supervisory power, S.Ct.R. 10.

ADDITIONAL STATUTE INVOLVED

28 U.S.C. §2101(c) states: "Any other appeal or any writ of certiorari intended to bring any judgment or decree in any civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

I. THIS COURT HAS JURISDICTION.

The Orlando Brief, p. 2, cites four U.S. Supreme Court denials of certiorari, to suggest that Petitioner filed this action in untimely fashion after 90 days. No mention is made of the aforementioned statute, though three denials cite it specifically, the fourth by implication.

Relying on the last sentence, Petitioner sought an extension, "for good cause shown," and received it from Circuit Justice Anthony Kennedy, p. 115-a. Petitioner needed such extension, to make certain that he could make a full presentation, even if his petition were due within 90 days from dismissal of the appeal, rather than from action on a petition for rehearing pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure, pp. 1-a/2-a.. See *Missouri v. Jenkins*, 497 U.S. 33, 46-50 (1990). Such extensions are not granted as a matter of course, *Kleem v. Immigration and Naturalization Service*, 479 U.S. 1308, 1309 (1986)(Extension denial by Circuit Justice Antonin Scalia.)

Respondents could have opposed the application for an extension of time but none of them did so. The petition was timely filed within the time allowed by the Circuit Justice. This Court has jurisdiction to consider the merits.

II. THIS PETITION REQUIRES SCRUTINY MANDATED IN *LILJEBERG v. HEALTH SERVICES ACQUISITION CORPORATION.*

The Orlando Brief, p. 13, does cite *Liljeberg v. Health Services Acquisition Corporation*, 846 U.S. 847 (1988), but primarily to show apparently that Judge Fawsett was right in not stepping aside from 1995-2003 on the basis of "unsupported, irrational or highly tenuous speculation," *id.*, at 859-60. The Orlando Brief does not address the undisclosed *ex parte* communications Judge Fawsett and the other jurists had with the Bernhardt, Kohler and other Orlando employees, at invitation-only meetings without notice to Plaintiffs. See, e.g., pp. 95-a, 101-a/104-a. Those surfaced only after she did step aside *sua sponte*, because she claimed she had been informed that an unidentified investment in which she held an undetermined interest would undertake negotiations with the City of Orlando about an undisclosed subject in the near future (p.74-a). She had used the same reason to step aside in a related False Claims Act case three months earlier (p. 69-a).

The aforementioned *ex parte* communications giving rise to this petition are not mentioned at all in the Orlando Brief. Indeed, the only mention of *ex parte* communications is on the same page 13. A lower court case is cited to support the proposition that a judge should not step aside, because of conclusory allegations; further, the plaintiff could not identify the *ex parte* communicants. The Orlando Brief is replete with a dozen other similar citations from various circuits being offered as black letter law binding this Court.

The citations to this Court's decisions also are misleading. Petitioner already has noted four cited in the Orlando Brief, p. 2, without notation that each was a *per curiam* statement in denial of a petition for writ of certiorari.

> It is important to emphasize that the denial of the petition for writ of certiorari is not a ruling on any of the unsettled and important questions of law presented in the petition. See *Singleton v. Commissioner*, 439 U.S. 940, 942 (1978).

Haitian Refugee Center, Inc., v. Baker, 501 U.S. 1122 (1992)(Stevens, J. respecting denial of certiorari).

In the Orlando Brief, p. 1, *Baker* is cited for a desired application of Rule 10, S. Ct. R. to block the petition here. In fact, the only mention of Rule 10 occurs in a comment by one justice who alone should have been cited, *"Haitian Refugee Center, Inc., v. Baker*, 501 U.S. 1122, 1123 (1992)(Thomas J., respecting denial of certiorari)."

Another misleading cite is offered to support a demand for sanctions here. See the Orlando Brief at p. 15. In addition to an applicable court rule, that Brief cites and quotes from what appears to be the Court's decision in *Clark v. Florida*, 475 U.S. 1134 (1986). But the Court only dismissed for want of jurisdiction or, "treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied." The opinion is that of only one justice, Chief Justice Warren Burger, at pp. 1134-1138.

The Orlando Brief cites, at p. 12, *Toledo Scale Company v. Computing Scale Company*, 261 U.S. 399, 425 (1923) to show that the U.S. Supreme Court is prevented from taking jurisdiction "by a most salutary rule of law which after parties have had a full and fair opportunity to prepare their case, refuses to permit them to drag out litigation by bringing in new evidence which with due diligence they ought to have discovered before the hearing."

With due diligence, should Petitioner have been able to discover Judge Fawsett's hidden agenda to get a new federal courthouse to her liking when she learned by October 3, 1996 that money had become available for that purpose? See Petition for Writ of Certiorari, pp. 19, 89-a. Judge Fawsett a few weeks later granted judgment to all Respondents on the same day the representative of the U.S. Department of Justice was faxing for information to prepare for jury trial a week later. See Petition for Writ of Certiorari, p. 10. Before any fees were awarded against Petitioner, on appeal, and certainly below, should he have been able to find out what Eleventh Circuit representatives knew about ongoing discussions in the spring of 1998 between Judge Fawsett and at least one other judge and Orlando's Bernhardt and Kohler at invitation-only meetings? Orlando withheld that correspondence until March 2003.

What the Orlando Brief fails to do is provide any meaningful response to the question presented here: Is Petitioner entitled to relief, because of "• a systematic derogation of due process of law by a cover up of *ex parte* communications without notice to him, • between and among trial and appellate judges, court personnel and defendant Orlando agents including Bernhardt, (at) private meetings held (during a period of) several years....• about a new federal courthouse discussed in the context of municipal planning goals for the surrounding historically black Southwest Quarter of the city?" See Petition, p. i.

The *ex parte* communications at issue here dwarf by comparison those which required a disqualification as soon as possible after they were discovered, in *Liljeberg*, *supra*. Under these extraordinary circumstances, this Court should order judgments entered below–to date–to be vacated, to assure that justice will satisfy the appearance of justice, *Liljeberg*, 486 U.S. *supra* at 863-864.

III. SUITABLE COUNSEL CAN BE FOUND TO ARGUE THESE IMPORTANT ISSUES.

In light of the Orlando Brief, submitted by an attorney who claims to be a member of the Bar of this Court, Petitioner fears that his petition could be denied. He is disfavored by appearing here *pro se* Although Petitioner was heartened by this Court's granting of a motion to an attorney to proceed *pro se*, or *pro hac vice*, albeit as a respondent, *Elk Grove Unified Sch. Dist. v. Newdow*, #02-1642 (Motion granted Dec. 1, 2003), he already actively seeks representation by an experienced member of the Bar of this Court to address the questions presented concerning the effect on judgments of years of revelations of *ex parte* communications between judges and Orlando representatives first disclosed in 2003, if this petition for a writ is granted.

Petitioner obviously cannot speak for Respondents' legal representation, but the current open controversy about the waste of federal rental housing rehab funds, *supra*, at p. 4, first exposed in his complaint, should prompt fresh review of these proceedings by the City's legal arm. To that end, Petitioner is serving copies of this Brief upon the Orlando City Attorney who took office last year for a new mayor.

CONCLUSION

For the reasons set forth in the petition and this supplementary and responsive brief, Petitioner seeks review of the questions presented concerning Orlando Respondents, and separately, Orlando Neighborhood Improvement Corp.

Respectfully submitted,

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